No. 00-5250-CSY Title: Wesley Aaron Shafer, Jr., Petitioner
v.
CAPITAL CASE South Carolina

Docketed: Court: Supreme Court of South Carolina
July 20, 2000

Entry	Date	Proceedings and Orders
	Jul 14 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 19, 2000)
	Aug 21 2000	Brief of respondent South Carolina in opposition filed.
	Aug 23 2000	Reply brief of petitioner Wesley Aaron Shafer, Jr. filed.
	Aug 31 2000	DISTRIBUTED for Conference of September 25, 2000
	Sep 26 2000	Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT January 9, 2001. **********
	Oct 10 2000	Motion of petitioner for appointment of counsel filed.
	Oct 18 2000	Joint appendix filed.
	Nov 1 2000	DISTRIBUTED. November 22, 2000 (Page 5)
	Nov 13 2000	Brief amicus curiae of Cornell Death Penalty Project filed.
	Nov 13 2000	Record filed.
	Nov 13 2000	Brief of petitioner Wesley Aaron Shafer, Jr. filed.
	Nov 17 2000	Record filed.
	Nov 27 2000	Motion for appointment of counsel GRANTED and it is ordered that David I. Bruck, Esquire, of Columbia, South Carolina, is appointed to serve as counsel for the petitioner in this case.
	Dec 5 2000	CIRCULATED.
	Dec 13 2000	Brief of respondent South Carolina filed.
	Dec 26 2000	Reply brief of petitioner Wesley Aaron Shafer, Jr. filed.
	Jan 8 2001	Letter and attached lower court opinion (South Carolina v. William A. Kelly) received from counsel for the rendent and distributed.
	Jan 9 2001	ARGUED.

00-5250 (2)

Supreme Court, U.S.
FILED
JUL 17 2000
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-

Wesley Aaron Shafer, Jr.

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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109 pp

QUESTIONS PRESENTED

1.

Whether petitioner's due process rights under Simmons v. South Carolina, 512 U.S. 154 (1994), were violated by the trial court's refusal to instruct the sentencing jury that "under South Carolina law, [petitioner] would be ineligible for parole if the jury were to vote for a life sentence," Ramdass v. Angelone, 120 S.Ct. 2113, 2119 (2000) (plurality opinion), and by the South Carolina Supreme Court's holding that Simmons no longer applies to South Carolina's capital sentencing scheme.

2.

Whether prosecutors' capital sentencing arguments based on general deterrence violate due process when state law immunizes them from evidentiary rebuttal.

00-5250

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-

Supreme Court, U.S.
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Wesley Aaron Shafer, Jr.

Petitioner,

v.

State of South Carolina,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Wesley Aaron Shafer respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 39 of this Court. Petitioner previously applied for and was granted indigent status in the Union County, South Carolina Court of General Sessions. The affidavit of petitioner in support of this motion will be filed as soon as it received by counsel.

Respectfully submitted,

David I. Bruck

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(803) 765-1044

July 12, 2000

COUNSEL FOR PETITIONER

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CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming petitioner's conviction and death sentence for murder is as yet unreported, and is reprinted in the Appendix to this petition at A-1 to A-20.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on May 8, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the fourteenth amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any state deprive any person of life . . . without due process of law . . . ."

2. It also involves S.C. Code §§ 16-3-20 et seq. (1999 Cum. Supp.), which code section is reprinted in the Appendix to this petition at A-23 through A-26.

STATEMENT OF FACTS

1. Introduction

Simmons v. South Carolina, 512 U.S. 154 (1994), held that capital defendants have a due process right to rebut a prosecution claim of future dangerousness by informing the jury, if it

is so, that the jury's "life imprisonment" alternative means life imprisonment without the possibility of parole. At the time the Court decided Simmons, most South Carolina capital murderers sentenced to life imprisonment could be paroled after 30 years.[1] About a year after Simmons, however, the South Carolina legislature abolished parole for all convicted murderers. Act No. 83, § 10, 1995 S.C. Acts 557, codified as S.C. Code § 16-3-20 (Supp. 1999), reprinted infra at A-23 to A-26. The 1995 legislation specified life imprisonment without any possibility of parole or other early release as the only non-capital punishment available upon conviction for murder, provided that the state sought the death penalty and the sentencing jury rendered the offender death-eligible by finding the existence of one or more statutory aggravating factors. Id. A less-than-life alternative sentence of at least 30 years was available only if the death penalty was not sought, or if the jury found the offender ineligible for the death penalty due to the absence of any statutory aggravating circumstance. Id. Although this amendment greatly increased the number of South Carolina capital murderers subject to life without parole and thus to the benefit of the Simmons rule, in this case the South Carolina Supreme Court declared its actual

[1]The defendant in Simmons faced life without parole only because his prior criminal record triggered a statutory recidivist provision. See Ramdass v. Angelone, 120 S.Ct. 2113, 2119-21 (2000) (plurality opinion).

effect to be just the opposite: according to the state court, the availability of a less-than-life sentence for non-death-eligible murderers actually renders Simmons inapplicable to South Carolina capital sentencing proceedings. The facts giving rise to this decision are as follows.

2. Pretrial and trial proceedings.

About three months after the 1995 parole legislation went into effect, 18-year-old Wesley Aaron Shafer, Jr., confessed to fatally shooting a convenience store operator during an attempted robbery. A South Carolina state court jury subsequently convicted him of murder. At the capital sentencing proceeding which followed his conviction, the state relied on the statutory aggravating circumstance of attempted armed robbery, and also introduced nonstatutory aggravating evidence relating to petitioner's criminal activities and propensities.

Future dangerousness as such is not a statutory aggravating circumstance aggravating factor under South Carolina law, but "[a]lthough South Carolina statutes do not mandate consideration of the defendant's future dangerousness in capital sentencing, the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." Simmons v. South Carolina, supra, 512 U.S. at 162-63 (plurality opinion).[2]

[2]"South Carolina's death penalty sentencing scheme 'was patterned after the death penalty statutes of . . . Georgia,'" State v. Locklair, Op. 25161 (S.C., June 26, 2000), quoting State

While nonstatutory "selection" aggravating factors need not be specifically alleged by the prosecution, and the sentencing jury makes no specific findings as to their existence, South Carolina law does require the state to provide its evidence in aggravation to the defendant in writing prior to trial. S.C. Code § 16-3-20(B) (Supp. 1999); State v. Riddle, 353 S.E.2d 158 (S.C. 1987). In compliance with this notice requirement, the prosecution advised petitioner that the state intended to introduce in aggravation of punishment, among other things,

- "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm as an adult and a juvenile," R. 9,
- "evidence . . . as to the Defendant's character and conduct while incarcerated in jails and/or prisons as an adult and a juvenile . . ." R. 10, and
- "evidence . . . relating to his release or parole from jails and/or prisons as an adult and a juvenile; opinions as to the Defendant's character, propensity for violence and unlawful conduct, disregard for peace and good order and to commit such acts in the future." R. 10.

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v. Shaw, 255 S.E.2d 799, 802 (S.C. 1979), and is a thus a "non-weighing statute." Under such statutes, death eligibility is established by proof of a single statutory aggravating circumstance, S.C. Code § 16-3-20(C) (Supp. 1999), and the sentencing jury is then authorized at the "selection" stage to consider all facets of the crime and of the defendant's character and prior record in deciding whether to impose the death penalty or life imprisonment. State v. Shaw, supra, 255 S.E.2d at 808; State v. Plath, 313 S.E.2d 619, 623 (S.C. 1984); see also, Zant v. Stephens, 462 U.S. 862, 872 (1983) ("'In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.'" (quoting from Georgia Supreme Court's description of Georgia statute)) Nonstatutory aggravating factors, such as the defendant's prior criminal behavior, his character, and his future dangerousness, are thus all admissible as sentencing considerations.

After receiving this formal notice that the prosecution intended to rely upon petitioner's "propensity to commit . . . acts of violence" as a reason why the jury should sentence him to death, petitioner repeatedly requested, pursuant to Simmons and S.C. Code § 16-3-20(A), that the court instruct the sentencing jury that its capital sentencing alternative of life imprisonment carried no possibility of parole or other form of early release. However, despite its pretrial allegations concerning petitioner's alleged incorrigibility and dangerousness, the state energetically opposed such a no-parole instruction at trial, while semantically re-characterizing its own evidence in an effort to avoid the effect of the Simmons rule.

The state's sentencing evidence included testimony by law enforcement and jail personnel concerning petitioner's criminal record and his allegedly defiant and assaultive behavior in pretrial detention. Through these witnesses, the state sought to establish the following facts:

- at age 17, petitioner was convicted of burglary and criminal sexual conduct, after he and some friends confessed to having sex with two 12-year-old girls in an unoccupied house, R. 1446 to 1450;
- after receiving a probationary sentence for his burglary and criminal sexual conduct convictions, petitioner violated probation by being rearrested for burglary and driving under suspension, by twice testing positive for marijuana, and by failing to report both to his probation officer and for

court-ordered sex offender counseling, R. 1483-84, 1488;

- while awaiting trial for capital murder, petitioner was charged with assaulting a female staff member at the county jail after he became enraged and verbally abusive because she had terminated the inmates' telephone calls, R. 1468-1471;
- petitioner was also charged with possession of contraband in the jail for illegally possessing and smoking cigarettes, R. 1478-1480;
- that on the night of his arrest, petitioner asked a jailer whether his father would get his pistol back after it had been seized as the murder weapon, R. 1501, and
- that petitioner acted like the murder "didn't even bother him" when discussing it with a fellow jail inmate shortly after his arrest. R. 1490, 1493.

Petitioner's mitigation evidence consisted primarily of testimony concerning the physical and emotional abuse that he had suffered as a small child and as an adolescent. R. 1578-81, 1584-95, 1598-99. He also introduced expert psychological testimony to the effect that the unrelenting mental and physical abuse he endured over the course of his childhood had left him traumatized, chronically depressed, and at risk for drug abuse and explosive outbursts of aggression. R. 1623-30; 1711.

At a charge conference near the end of the defense case in mitigation, the prosecutor argued that petitioner was not entitled to a Simmons instruction on parole ineligibility because, as in State v. Southerland, 447 S.E.2d 862 (S.C. 1994), the prosecution had not "made future dangerousness an issue in this case."

R. 1817-18.[3] The prosecutor further requested, for the same reason, that the judge "prevent the defense from arguing in their closing argument anything to the effect that he will never get out of prison or anything of this order." R. 1818. Defense counsel protested that the prosecution had presented evidence of petitioner's assaultive and lawless behavior in jail after his arrest, asserting that "if you put a jailer on to say that [petitioner] is charged with assault and battery on me, that is future dangerousness." R. 1819. In response, the prosecutor averred that

> [h]e was charged with simple assault, not assault and battery. And, second, we put that in for two reasons, to show his character and to show his adaptability to prison, not future dangerousness. Nobody has argued future dangerousness or said that he might do this again in the future, and the state doesn't intend to in its closing argument.

R. 1819. After further discussion, the trial judge ruled that the state had not yet "argued" future dangerousness as a sentencing consideration, and unless this changed, he would not charge the jury concerning petitioner's parole ineligibility. R. 1820-21.

Defense counsel next requested that he be permitted to read

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[3]Earlier in the proceedings, the state had succeeded in preventing any mention of South Carolina's abolition of parole during the voir dire examination of prospective jurors, R. 101, and obtained a similar ruling prior to defense cross-examination of a key state's witness that the state feared might "educate the jury as to the non-existence of parole eligibility." R. 1182.

the relevant portion of S.C. Code Ann. § 16-3-20(A) to the jury. R. 1838. In pertinent part, that code section provides as follows:

> If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt. . . and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section,"life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.

With the state's consent, the trial court eventually agreed to charge that portion of the statute providing that "'life imprisonment' means until death of the offender." R. 1840-41, -43. However, the court denied defense counsel's request that he be permitted to read the rest of the above-quoted section of Code § 16-3-20(A) to the jury in the course of argument in order to make clear that life imprisonment excluded all possibility of parole. R. 1839.

Having thus ensured that the jury would not be "educate[d] as to the non-existence of parole eligibility," the prosecutor ended his closing argument with a dramatic evocation of the murder scene which wove together his belief in the alleged deterrent value of capital punishment with the witnesses' expressed fear, after discovering the dying victim, that the

killers "might come back." The prosecutor stated:

> Ladies and gentlemen, one of the scariest things . . . about . . . the video where we saw the cash tape, the horror and all of the sound, do you remember the girls that came in and when Jamie Palmer was saying, "Oh God; oh, God; oh, God, Ray," and the girls were running in and out, we've got to go, we've got to go, and I tell you what, I've listened to it, you've listened to it, and you will have a chance again, but what is really etched in my mind is Monica Inman. Remember Jamie picks up that phone and she's calling 911, and Monica Inman says, "Come on, Jamie, <u>they might come back, they might come back.</u>"
>
> Ladies and gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the state. So the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, <u>and they might come back, they might come back</u>, they will remember this day, and they will remember this jury, and they will remember this verdict.

R. 1891-92 (emphasis added).

At the conclusion of the argument, defense counsel renewed petitioner's request for a no-parole instruction on the grounds that the prosecutor's dramatic and repeated evocation of the witnesses' fear that the murderers "might come back" had again raised the issue of petitioner's future dangerousness. R. 1893-1896. The prosecutor continued to deny having suggested that petitioner would be dangerous in the future, insisting that his argument was intended only to urge the general deterrent effect of a death sentence in this case on other would-be murderers. The trial judge denied petitioner's renewed request for a <u>Simmons</u> instruction, stating that the prosecutor's jury argument "comes

close" to a future-dangerousness claim, but did not "cross the line." R. 1896.

In keeping with this ruling, the trial judge never informed the jury at any point in his sentencing instructions that South Carolina law prohibits parole or other form of early release for a defendant who has been sentenced to life imprisonment for murder. The judge did state that "life imprisonment means incarceration of the defendant until his death." R. 1926. However, after three-and-a-half hours of deliberation, the jury sent two written questions to the court which revealed that the jury had not interpreted the court's "incarceration until death" instruction as necessarily precluding the possibility of parole:

> 1. Is there any remote chance for someone convicted of murder to be eligable [sic] for parole?
>
> 2. Under what conditions would someone convicted for murder be eligable [sic]?

R. 1937-38. There followed more than 45 minutes of discussion between the court and counsel while the jury waited for an answer to its questions. The state continued to insist that the jury should not be informed of the unavailability of parole because "future dangerousness has not been argued as an issue." Petitioner's counsel renewed his earlier request that the court read to the jury those portions of S.C. Code § 16-3-20(A) immediately preceding and following the single sentence already charged. R. 1941-42. The court denied this request, and eventually decided

PUBLISHER'S NOTE:

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belief therein, gave rise to their verdict." Counsel also requested the court to make an inquiry of a member of the trial jury who had indicated during jury selection that she worked for the parole board, R. 389, to determine whether she had "expressed personal knowledge outside of the evidence and the law given." R. 1961. The trial judge denied both requests, dismissed the jury, and sentenced petitioner to death. R. 1961-64.

3. Appeal

On direct appeal to the South Carolina Supreme Court, petitioner renewed his argument that the federal due process rule of Simmons v. South Carolina entitled him to advise the jury of the unavailability of parole had he been sentenced to life imprisonment. State v. Shafer, Brief of Appellant at 24-30; Reply Brief at 4-16. In response, the state advanced a new rationale to justify the denial of a Simmons instruction. Pointing out that under South Carolina's amended sentencing statute, a capital defendant can receive a less-than-life sentence if the jury finds no statutory aggravating circumstance, the state insisted that the South Carolina statute no longer satisfies the first, "life-without-parole" requirement of Simmons. As a result, according to the state, Simmons no longer applies to any South Carolina capital proceedings conducted under the post-1995 statute--despite the fact that once the jury determines that the defendant is death-eligible and turns to the

issue of whether to impose the death penalty, the only available non-capital alternative under South Carolina law is life imprisonment without possibility of parole or other form of early release. State v. Shafer, Brief of Respondent at 21-29.[4]

With one justice dissenting, the South Carolina Supreme Court agreed with this argument, and on that basis upheld the trial judge's refusal to give a Simmons instruction. In petitioner's case and in a companion case decided the same day, State v. Starnes, Opinion No. 25119, 2000 WL 576191 (S.C., May 8, 2000),[5] the state supreme court majority held Simmons to be inapplicable to post-1995 South Carolina capital cases "because life imprisonment is not the only legally available sentence alternative to death." State v. Shafer, Opinion No. 25120 (S.C., May 8, 2000), infra at A-1, A-6. In its Starnes opinion, to which the Shafer opinion referred, the state court quoted at length from the amended S.C. Code § 16-3-20, emphasizing those provisions that authorize sentences of as little as 30 years if (and only if) "no aggravating circumstance is found." § 16-3-

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[4]The state did acknowledge that a Simmons instruction might still be required where the prosecution had exercised its discretion to invoke a recidivist statute that mandates life sentences for certain second or third felony convictions. State v. Shafer, Brief of Respondent at 29, citing S.C. Code § 17-25-45 (Supp. 1999).

[5]The state court reversed the convictions in Starnes on other grounds, thereby rendering moot the Simmons issue in that case.

20(B). Starnes, supra, at *8. The court did not, however, include or refer to the next section, § 16-3-20(C), which provides in relevant part:

> Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A) . . . . If the jury does not unanimously find any statutory aggravating circumstance or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation.

(Emphasis supplied). To petitioner's argument that under the portion of § 16-3-20(C) quoted above, a South Carolina jury does not even deliberate on the issue of sentence unless and until it has found an aggravating circumstance--at which point the only alternatives are indeed death and life without parole--the state supreme court responded as follows:

> Appellant argues Simmons mandates a charge on parole ineligibility when the State argues future dangerousness and the jury's sentencing recommendation is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read Simmons so narrowly. By its own terms, Simmons requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is legally available to the defendant. Simmons, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole...".) (emphasis added).

Because a sentence of as little as 30 years could be imposed--albeit only if the jury failed to find the defendant death-eligible, and thereby passed sentencing responsibility to the judge--the state court majority held Simmons inapplicable to the

amended South Carolina sentencing scheme. In support of this holding, the court cited a series of state and federal cases holding Simmons inapplicable where, if the jury declined to impose the death penalty, the defendant would have been eligible either for parole, Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 514 U.S. 1108 (1995); State v. McLaughlin, 462 S.E.2d 1 (N.C. 1995), cert. denied, 516 U.S. 1133 (1996); or for a less-than-life sentence to be selected by the court. United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996); People v. Simpson, 665 N.E.2d 1228 (Ill.), cert. denied, 519 U.S. 982 (1996). Infra, A-6 to A-7.

After rejecting petitioner's Simmons claim, the state court also held that a separate eighth amendment claim was procedurally defaulted because his trial counsel had failed to elaborate upon his citation of the eighth amendment as one of the bases of his objection. A-8. The court then rejected petitioner's eighth amendment claim on its merits, A-8 to A-11, and approved the trial court's supplemental instructions under pre-Simmons South Carolina case law. A-11 to A-14.

On June 6, 2000, the South Carolina Supreme Court stayed petitioner's execution to allow the filing of this petition for writ of certiorari. A-21 to A-22.

WHY THE WRIT SHOULD BE GRANTED

1. South Carolina's declaration that Simmons v. South Carolina no longer protects capital defendants in that state is flatly inconsistent with Simmons and should be reversed.

A. South Carolina's capital sentencing scheme unquestionably satisfies the life-without-parole requirement of *Simmons* and *Ramdass*.

Mistaking an out-of-context phrase from Justice O'Connor's concurring opinion in Simmons for the holding of the case, the South Carolina Supreme Court's decision here and in Starnes would, if allowed to stand, effectively nullify the protection afforded South Carolina capital defendants by the due process rule of Simmons. Until this case, South Carolina was one of only two life-without-parole jurisdictions that still refused to inform capital sentencing juries of the non-existence of parole except to the extent required by Simmons. State v. Southerland, 447 S.E.2d 862 (S.C. 1994) (Simmons instruction not required because state did not rely on future dangerousness), vacated on other grounds, 524 S.E.2d 833 (S.C. 1999); Commonwealth v. Speight, 677 A.2d 317 (Pa. 1996) (same); but see, Yarbrough v. Commonwealth, 519 S.E.2d 602 (Va. 1999) (requiring no-parole instructions even where future dangerousness not at issue). With its decision here, South Carolina seeks to extend this refusal far beyond what Simmons and due process permit. This Court

should not countenance such clear disregard of one of its constitutional decisions in a capital case.

The South Carolina Supreme Court's error in this case is plain. The state court overlooked that if the jury fails to find any statutory aggravating circumstance, S.C. Code Ann. § 16-3-20(C) provides that the jury "shall not make a sentencing recommendation" at all, and the selection of a noncapital sentence becomes the sole province of the court. Under the current South Carolina sentencing scheme--and under the jury's instructions in this case--the jury does not even engage in sentencing deliberations unless and until it has established the defendant's death-eligibility by finding at least one statutory aggravating circumstance. And once that point is reached, it is undeniably true, as the trial judge explained to petitioner's jury, R. 1917, 1919-20, 1930-31, that the only two possible sentences are death and life imprisonment. What petitioner's jury did not know, even after inquiring about the subject, was that "life imprisonment" means life imprisonment without possibility of parole.

United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), on which the state supreme court relied, is inapposite. Flores involved a federal murder statute, 21 U.S.C. § 848(e), which provides for sentences ranging from 20 years to death. The jury's only sentencing function under § 848 is to decide whether or not to impose the death penalty: if it does not, the judge

selects a non-capital sentence. 21 U.S.C. § 848(k). While the facts of Flores made any less-than-life sentence highly unlikely, federal law did not preclude such a sentence, and so Simmons did not apply. 63 F.3d at 1368; accord, Ramdass v. Angelone, 120 S.Ct. 2113 (2000). South Carolina's sentencing system, by contrast, requires the jury to choose between life and death, and does preclude any sentence less than life without parole once the jury's sentencing role is triggered by a finding of death-eligibility. Because state law provides no alternative but life without parole for any jury that actually considers whether to sentence a defendant to death, the Simmons requirement of a life-without-parole alternative to the death penalty is now satisfied in every South Carolina capital case, including this one.

If Simmons itself could have left any doubt on this point, Ramdass v. Angelone removes it. In Ramdass, decided just after the South Carolina Supreme Court's decisions in Shafer and Starnes, Justice Kennedy explained for a four-member plurality of the Court that "[t]he premise of the Simmons case was that, under South Carolina law, the capital defendant would be ineligible for parole if the jury were to vote for a life sentence." 120 S.Ct. at 2119. Later, Justice Kennedy elaborated on this point, observing that under Simmons, a "parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law."

Id., 120 at 2120.

This description of the scope of Simmons clearly includes the amended South Carolina statute under which petitioner was sentenced. Petitioner's jury was given a life-imprisonment alterative, and was required (after finding an aggravating factor) to impose either life or death. The fact that a lesser sentence might have been imposed if the jury did not find a statutory aggravating circumstance is irrelevant, both because any South Carolina jury with the legal authority to impose the death penalty case can also impose a life-without parole sentence (and no other alterative sentence), and because a jury that cannot impose the death penalty for lack of a statutory aggravating factor may also not impose--or even consider--any other sentence. Thus it is just as true in petitioner's case as it was in Simmons itself that the only non-capital sentence available to the sentencing jury was life without parole.

B. The prosecution placed petitioner's future dangerousness in issue.

The state supreme court did not address the state's alternative argument for denying a Simmons instruction, which was that the prosecution did not "argue" future dangerousness as an aggravating factor. Since the state will likely renew this argument as an alternative reason to deny review, petitioner will address it here.

As is often the case, the state's evidence bearing on future

dangerousness centered on the facts of the crime itself, petitioner's prior criminal record, his violations of probation, and his misbehavior in confinement. Before trial (and apparently before considering the Simmons implications of its evidence), the state forthrightly characterized much of this case in aggravation as "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm." R. 9. The state later re-characterized this evidence as relating to petitioner's "character" rather than to his "dangerousness" in an effort to avoid a Simmons instruction, but the evidence itself did not change. Thus the state introduced petitioner's prior record for burglary and criminal sexual conduct, along with evidence that petitioner had threatened and assaulted a female jail employee while awaiting trial.

While this evidence was arguably relevant to more than one issue, future dangerousness was undeniably one of the issues suggested by evidence that petitioner committed sexual crimes against a 12-year-old-girl, and that he was prone to angry and impulsive outbursts of aggressive behavior. After listening to the jail officer's testimony concerning petitioner's angry assault on her, and considering the extreme impulsivity revealed by the videotape of the murder itself, the jury likely found itself wondering (and discussing) whether the risks of allowing petitioner to live were unacceptably great. Would he repeat this

sort of behavior? Would he prove similarly impulsive and angry in the future? Would he strike again, whether in prison or, if released, in society? And the fact that the jury found it necessary to ask the judge whether petitioner would ever be eligible for parole further indicates that the evidence tending to show his future dangerousness was indeed interpreted in just this way. Given the evidence and the jury's parole questions, it is plain that petitioner's future behavior, and his potential for future dangerousness, were among the factors weighed by the jury as it deliberated life and death.

In this connection, the type of evidence presented by the state in this case is regarded as tending to prove future dangerousness in states where dangerousness is a formal statutory factor. Both Virginia and Texas, which employ future dangerousness as statutory aggravating factors, have held that the facts of the capital murder itself alone may support a finding of dangerousness beyond a reasonable doubt. See, e.g., Pope v. Commonwealth, 360 S.E.2d 352, 361 (Va. 1987), cert. denied, 485 U.S. 1015 (1988) (holding that future dangerousness factor was established by "the unprovoked and sudden nature of the violence Pope employed on the two victims in this case, who were unarmed and constituted no threat to him, as well as the unnecessary degree of deadly force he chose to employ to accomplish his purpose of robbery and to quell resistance."); Cantu v. State,

842 S.W.2d 667 (Tex. Crim. App. 1992), cert. denied, 509 U.S. 926 (1993) (restating general rule that "the circumstances of the offense alone, if severe enough," can support finding of future dangerousness beyond a reasonable doubt). Likewise, evidence of prior convictions and other violent or anti-social conduct is almost always offered to prove future dangerousness where such evidence is available. See e.g., Johnson v. Texas, 509 U.S. 350, 355 (1993) (state proved future dangerousness by introducing 19-year-old offender's prior crimes); State v. Tucker, 478 S.E.2d 260, 269-70 (S.C. 1996), cert. denied, 520 U.S. 1200 (1997) (recognizing that evidence of past criminal behavior is highly relevant to both character and future dangerousness of convicted murderer).

Because South Carolina is a "non-weighing" jurisdiction, petitioner's jury was not required to indicate whether it had drawn such commonsense conclusions about his future behavior from the evidence of his past behavior. But the jury's instructions clearly authorized it to draw such conclusions. See e.g. R. 1924-25 (court instructs that jury may consider petitioner's prior offenses "as evidence of his character, his characteristics . . . and you may give them whatever weight you deem proper . . . ."). And the jury's parole questions strongly suggest that it did.

To be sure, the prosecutor avoided using the term "danger-

ousness" in his closing argument, since he knew that under Simmons too explicit a discussion of that issue would doom his efforts to keep the jury in the dark about petitioner's ineligibility for release. But when he dramatically and repeatedly recalled a witness's videotaped warnings after the shootings that the killers "might come back," he was powerfully evoking the jury's fear of future depredations by a killer who has been loosed upon society. Of course, "they might come back" was a metaphor rather than a literal description of the danger that petitioner posed in the future. But so was the prosecutor's "dangerousness" argument in Simmons itself. In that case the prosecutor never used the terms "dangerous" or "dangerousness," nor did he offer any prediction of what the defendant would do in the future if not executed. The sum total of the Simmons prosecution's injection of future dangerousness, as summarized both by the plurality and by Justice O'Connor's concurrence, was as follows:

> The question for the jury, the prosecution argued, was "what to do with [petitioner] now that he is in our midst." The prosecution further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense."

512 U.S. at 157, 177. These veiled references to Simmons' dangerousness were hardly unmistakably clear. Indeed, two dissenting Justices detected nothing at all in the prosecutor's argument that even referred to Simmons' future behavior: to the

dissenters, the "in-our-midst" passage referred only to Simmons' alleged attempt to blame his crimes on his childhood environment, while the "self-defense" reference was merely an appeal for a calm and dispassionate social response to Simmons' brutal crimes, rather than a sentence based on anger or emotion. 512 U.S. at 181-82 (Scalia, J., dissenting).

In this case, the prosecutor's haunting evocation of the witnesses' terrified cries that the killers "might come back" was at least as pointed a reference to the defendant's future dangerousness as anything in Simmons. Just as in Simmons, that argument entitled petitioner to inform the jury that he would not be "coming back" even if his life was spared, because under South Carolina law he would never be released from prison. And petitioner's right to so inform the jury was all the greater in light of the state's evidence which preceded it--evidence calculated to convince the jury of petitioner's dangerous impulsivity, anger and aggression.

Whether a given question is "in issue" before a jury depends not on the exact phraseology of the parties' closing arguments, but on the evidence presented and the legal framework within which the jury must come to judgment. In this case, the jury was certainly authorized to consider 19-year-old Wesley Shafer's likely future dangerousness as a reason to sentence him to death. State v. Woomer, 299 S.E.2d 317, 319-20 (S.C. 1982). The state

did everything it could, short of using the word "dangerousness," to encourage such consideration. Indeed, if future dangerousness had not been sufficiently "in issue" to trigger the due process protection of Simmons, petitioner would presumably have been entitled to an instruction directing the jury not to consider or even discuss the question of his likely future conduct as a reason to sentence him to death. But any attempt to craft an instruction differentiating the evidence of petitioner's dangerousness (i.e. his "characteristics" as revealed by his conduct) from the issue of his dangerousness will only serve to reveal the impracticality of the undertaking. In this case, dangerousness simply could not have been artificially excluded from the jurors' minds. This is so both because the evidence and the prosecutor's argument put the issue squarely before them, and because in a non-weighing jurisdiction such as South Carolina, no rule of law limits the jury's reasons for imposing the death penalty on a death-eligible defendant, nor requires the jury to perform the mental gymnastics necessary to segregate the issue of dangerousness from the overlapping issue of character.

In Simmons, dangerousness was raised in part (as it was here) by a veiled prosecution argument. But nothing in Simmons suggests that only the prosecutor's jury argument can inject the issue of dangerousness into a jury's sentencing deliberations, and common sense dictates otherwise. The unstructured manner in

which juries consider future dangerousness in non-weighing jurisdictions such as South Carolina increases the importance of careful judicial review to ensure that the Simmons rule is not evaded by the sort of semantic hairsplitting which the prosecution employed here.

In this case, both the prosecutor's argument and the evidence as a whole would logically have led the jury to consider the practical consequences--and potential dangers--of allowing Wesley Shafer to live. Simmons therefore entitled him to a fair hearing on that issue, by ensuring that the jury understood the full incapacitative effect of its life imprisonment option.

2. Petitioner was denied due process by the operation of a South Carolina rule that permits prosecutors to urge imposition of the death penalty to deter future murders, while forbidding capital defendants from proving that the death penalty has no such special deterrent effect.

A. How the deterrence issue arose and was decided below.

The prosecutor concluded his penalty phase closing argument by urging the jury to sentence petitioner to death in order to "send a message" to future would-be murderers.

> Ladies and gentlemen, you are the conscience of this community, and your verdict does send a message to Union county, to the state. So that the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, and they might come back, they might come back, they will remember this day, and they will remember this jury, and they will remember this verdict.

* * * *

> Let everyone know that this day in Union County justice was done in this case that will send a message of how Union County handles a crime of this nature.

Tr. 1891-1893. As petitioner has already pointed out, this argument was part of a veiled effort--centering on the prosecutor's evocative repetition of a witness's cry that the killers "might come back"--to focus the jury's attention on petitioner's future dangerousness. However, the prosecutor's argument was also a vivid appeal to impose the death penalty for its utility as a general deterrent--that is, for its supposed effect in deterring other potential murderers from committing future crimes. Indeed, in denying that his argument referred to petitioner's own dangerousness, the prosecutor insisted that "it was clear we were talking in the future context of people other than the defendant"--i.e. of general, rather than specific, deterrence. Tr. 1894.

In response, defense counsel made the following requests:

> [W]e would ask that the Court reopen the defense case during the sentencing to present issues of statistics and witnesses as to the death penalty not being a deterrent pursuant to the solicitor's comment that it would . . . keep others from coming back into the community and doing the same thing, and saying that it would send a message to the community to keep others from doing the same. Deterrence is not an issue unless brought in issue by the state; the prosecutor has done so, and we ask for time to present evidence to rebut that.

> In the alternative, we would ask the Court to instruct the jury to completely disregard any comments by the solicitor in regard to danger to the community.

Tr. 1894. The prosecutor countered, citing State v. George, 476 S.E.2d 903 (S.C. 1996), that "there is nothing to prevent the defense from arguing that it [the death penalty] is not a deterrent." Tr. 1895. Defense counsel insisted that the state's argument would deny due process, Tr. 1896, but trial judge denied both defense requests, stating: "Well, as our courts often do, they say you can't introduce that type evidence, but you can argue it. I'm not questioning the logic of our higher courts, but I'm going to deny your motion." Tr. 1895.

The trial court's ruling was based on a line of South Carolina cases upholding the right of a prosecutor to urge upon the jury his or her personal opinion concerning the general deterrent efficacy of the death penalty, while at the same time forbidding the defendant from presenting evidence tending to show that such opinions have no basis in fact. As the South Carolina Supreme Court summarized these decisions in State v. George, supra,

> [E]vidence attempting to establish the effectiveness and propriety of capital punishment as an instrument of deterrence is irrelevant and should not be admitted. State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), cert. denied, 467 U.S. 1265, 104 S.Ct. 3560, 82 L.Ed.-2d 862 (1984); State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), cert. denied, 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1413 (1983). However, counsel for both sides may argue their respective opinions concerning the deterrent effect of capital punishment,

> but cannot introduce specific data to corroborate their views. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168 (1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 800, 112 L.Ed.2d 861 (1991); State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989), cert. denied, 494 U.S. 1060, 110 S.Ct. 1534, 108 L.Ed.2d 773 (1990).

476 S.E.2d at 914.

On appeal, petitioner renewed his claim that due process entitled him either to present rebuttal evidence concerning general deterrence, or have the jury instructed to disregard the prosecutor's unsupported claims on the subject. The South Carolina Supreme Court rejected petitioner's due process challenge in the following discussion:

> In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996). Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.
>
> Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general deterrence. See State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied 519 U.S. 1061, 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge general deterrence need not be considered); State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), cert. denied 471 U.S. 1036 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatedly

allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168, cert. denied 498 U.S. 1074 (1990); State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied 462 U.S. 1124 (1983), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

State v. Shafer, infra, A-15 to A-16.

B. The Court should grant review to decide whether capital sentencing arguments based on general deterrence violate due process when state law immunizes them from evidentiary rebuttal.

Petitioner's due process claim is a narrow one. He does not at all challenge the authority of the states to exclude evidence bearing on the issue of general deterrence. He submits only that while states may (and most states do) bar defendants from presenting evidence on the death penalty's lack of efficacy as a general deterrent, due process is violated when the prosecution is allowed to urge a jury to impose the death penalty on a particular defendant for reasons of general deterrence, while the defendant is prohibited from responding with evidence to contradict the state's position.[6] This imbalance violates the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" Skipper v. South Carolina, 476 U.S. 1, 5, n. 1 (1976), quoting Gardner v. Florida, 430 U.S. 349, 362 (1977); accord, Simmons v. South Carolina, 512 U.S. 154 (1994).

South Carolina's resolution of this issue conflicts with that of several other states which forbid both argument and evidence regarding the deterrent effect of the death penalty in capital sentencing proceedings. For example, in People v. Marshall, 919 P.2d 1280, 1314 (Calif. 1996), the California Supreme Court held:

> [D]eterrence arguments rest on unproven assumptions and place a foreign weight on the scale on which should instead be made an individualized determination as to penalty. This principle is equally true whether it is the prosecutor who seeks to argue the death penalty's deterrent value, or the defense its opposite. Questions of deterrence or cost in carrying out a capital sentence are for the legislature, not for the jury considering a particular case.)(citations omitted);

Accord, Johnson v. State, 660 So.2d 637, 646 (Fla. 1995) (barring defense evidence on deterrence); Sutton v. State, ___ S.W.2d

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[6]For a recent survey of the social science research on the deterrent value of the death penalty, see William C. Bailey and Ruth D. Peterson, "Murder, Capital Punishment and Deterrence: A Review of the Literature," in Hugo Adam Bedau, ed., The Death Penalty in America: Current Controversies 135-161 (Oxford: 1997). Bailey and Peterson conclude that "[t]he available evidence remains 'clear and abundant' that, as practiced in the United States, capital punishment is not more effective than imprisonment in deterring murder." Id. at 155.

____, 1999 WL 423005, *26 (Tenn. Crim. App. 1999) ("the issue of specific or general deterrence should be avoided by the prosecution in closing argument at a capital sentencing hearing"); State v. Kirkley, 302 S.E.2d 144, 155 (N.C. 1983) (argument that death penalty should be imposed as a general deterrent amounted to improper interjection of prosecutor's personal opinion); State v. Irick, 762 S.W.2d 121, 131 (Tenn. 1988) cert. denied, 489 U.S. 1071 ("any argument based on general deterrence . . . is inappropriate at a [capital] sentencing hearing"); People v. Brisbon, 478 N.E.2d 402, 414-15 (Ill. 1985) (prosecutor's claims concerning alleged general deterrent effect of death penalty had "no more place in the sentencing determination than the 'speculative possibility' of parole"); but see Fleming v. State, 458 S.E.2d 638, 640 (Ga.1995)("Under well-established holdings of this court, both the prosecution and the defense have the opportunity to argue the issue (of deterrence) to the jury; both the prosecution and defense are precluded from introducing evidence on the issue.").

To be sure, general deterrence--the belief that potential criminals will respond to the example of severe punishment by refraining from committing crimes--is a permissible goal of a state legislature in adopting capital punishment as a penal sanction. Gregg v. Georgia, 428 U.S. 153, 186 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.). It is not, however, a proper or sufficient basis upon which to decide to impose a death sentence on a particular defendant. Spaziano v. Florida, 468 U.S. 447, 461 (1984). Rather, in a capital case, "the sentence imposed . . . should reflect a reasoned moral response to the defendant's character, background and crime." Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal quotations and emphasis omitted); People v. Brisbon, supra ("the defendant had a right to be judged on his conduct alone, without the introduction of inflammatory considerations" such as the prosecutor's deterrence claims).

General deterrence as an objective in individual capital cases conflicts with the constitutional requirement that the sentencing authority focus on the individual defendant and his specific crime. This is so because deterrence does not look to the question of whether the individual defendant deserves to be put to death, but directs the jury's attention instead to the question of whether imposition of the death penalty on this defendant will have a deterrent effect on other potential murderers--persons who have nothing to do with this defendant or this crime, whose identities are unknown, and who may not even exist. Deterrence as an objective of capital sentencing encourages the sentencer to regard the defendant on trial as simply a means to an end, and by its inherent logic tends "to treat all persons convicted of a designated offense not as uniquely indi-

vidual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The fact that petitioner's court-appointed counsel enjoyed the same right as the prosecutor to inject irrelevant and unproven policy considerations into the sentencing process does not satisfy the requirements of due process. A prosecuting attorney is not simply another lawyer. He represents the authority and credibility of the state itself, and when he makes a factual claim concerning the practical utility of a given verdict, he speaks as the law enforcement official whom the people have chosen to represent and safeguard them. Berger v. United States, 295 U.S. 78, 88 (1935). Whether imposition of the death penalty against a particular defendant will serve to deter future murders is the sort of question on which a jury likely to defer to the experience and specialized knowledge of the prosecuting attorney, and the defense lawyer's self-serving protestations to the contrary can hardly be expected to redress the imbalance. Despite the South Carolina Supreme Court's assurance that both sides are free to argue this point, it is simply not fair to pit two such unequal combatants in a test of personal credibility.

Because the state court failed to abide by the due process rule of Simmons, the jury that decided petitioner's fate did so

without a critical piece of information--the fact that he would never be paroled or otherwise released from prison if his life was spared. Having succeeded in keeping this truthful and important information from the jury, the prosecution compounded the unfairness of the proceedings by extolling the power of a death sentence in this case to prevent future murders--while petitioner could not respond with evidence to the contrary. South Carolina's endorsement of the prosecutor's right to urge jurors to impose the death penalty as a tool to deter others, in a setting that immunizes such claims from factual refutation, presents an important federal constitutional question on which state courts are divided. The Court should grant certiorari to answer it, and to restore the fundamental fairness of South Carolina capital sentencing hearings.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

BY: David I. Bruck
DAVID I. BRUCK
Attorney for Petitioner

July 12, 2000.

APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Wesley Aaron Shafer, Jr., Appellant.

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25120
Heard October 7, 1999- Filed May 8, 2000

AFFIRMED

David I. Bruck, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Ray Broome while attempting to rob the convenience store where Broome was

working. Appellant maintained the killing was without malice.[1] A jury convicted appellant of murder, attempted armed robbery, and conspiracy. He was sentenced to death for murder and consecutive terms of twenty years' imprisonment and five years' imprisonment, respectively, for attempted armed robbery and conspiracy.[2] Appellant appeals.

FACTS

Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.

At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.

Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned outside.

Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the

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[1]During the penalty phase of trial, appellant's expert witness testified appellant shot Broome in response to a lifetime of abuse and violence.

[2]The jury found the statutory aggravating circumstance of murder while in the commission of an attempted armed robbery while armed with a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) (Supp. 1998).

register counter, and shot Broome a second time.[3] Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.

Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store, found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head.[4] Broome died at the hospital.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him, and I'm the one that had the gun, and I guess I just snapped."

ISSUES[5]

I. Did the trial court err by refusing to instruct the jury appellant was parole ineligible?

II. Did the trial judge err by granting the State's motion to prohibit both the prosecution and defense from referring to the Bible or using religious references during closing argument?

III. Did the trial judge err by refusing to allow appellant to reopen the record to present evidence on deterrence or, alternatively, for a curative instruction after the solicitor argued

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[3]Appellant waited eight seconds before firing the second shot.

[4]All the events inside the Hot Spot were recorded on the store's security camera.

[5]All issues stem from the sentencing phase of appellant's trial.

the general deterrent effect of the death penalty?

DISCUSSION

I.

Appellant argues, for various reasons, the trial court erred by refusing to instruct the jury he was parole ineligible. We disagree.

After closing arguments, relying on Simmons v. South Carolina, 512 U.S. 154 (1994), appellant requested the trial court instruct the jury he would be ineligible for parole. The trial court denied the request.

Thereafter, the trial judge instructed the jury "life imprisonment means until the death of the defendant." He later stated: "[i]n deciding whether to sentence the defendant to death or to life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death."

After three and one-half hours of deliberation, the jury returned with the following questions:

1. Is there any remote chance for someone convicted of murder to become eligible for parole?

2. Under what conditions would someone convicted for murder be eligible?

Regarding Question 1, appellant agreed the trial court should instruct the jury "life imprisonment means until the death of the offender" and requested the court read the portion of § 16-3-20(A) which explains no person sentenced to life imprisonment is eligible for parole or any other form of release or credits which would reduce a life sentence. Appellant stipulated Question 2 could not be answered. After the trial judge informed the parties of his intended response to the jury's questions, appellant requested the trial

judge delete any reference to parole eligibility.[6]

The trial judge responded to the jury's questions as follows:

> Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge. Section 16-3-20 of our Code of Laws as applies to this case in the process we're in states that, 'for the purposes of this section life imprisonment means until the death of the offender.' Parole eligibility or ineligibility is not for your consideration.

Appellant excepted stating, "we would renew our objection under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the State and Federal Constitutions." The trial judge noted the exception.

A.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends Simmons mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. Id.; State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in

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[6]The trial judge stated he would charge the jury as follows: "[y]our consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16-3-20 of the South Carolina Code of Laws provides that for the purpose of this section life imprisonment means until the death of the offender. Parole eligibility is not for your consideration."

his view, would not pose a future danger to society." Simmons, 512 U.S. at 165 (1994) (plurality opinion).

Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp. 1998). Under the new sentencing scheme, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. We recently held Simmons is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. State v. Starnes, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 17).[7] Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues Simmons mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read Simmons so narrowly. By its own terms, Simmons requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to the defendant. Simmons, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole. . .".) (emphasis added). This interpretation is supported by decisions from other jurisdictions. Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999) (Simmons is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and,

[7]In Starnes, we suggested, under the terms of the statute, it is arguable a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

therefore Simmons is inapplicable); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 514 U.S. 1108 (1995) (Simmons applies where capital defendant is ineligible for parole as a matter of law; Simmons does not apply even if it is unlikely defendant would be paroled); People v. Simpson, 665 N.E.2d 1228 (Ill.), cert. denied, 519 U.S. 982 (1996) (Simmons inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); State v. McLaughlin, 462 S.E.2d 1 (N.C. 1995), cert. denied, 516 U.S. 1133 (1996) (Simmons inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, Simmons was inapplicable.[8]

B.

Appellant contends the failure to inform the jury he was parole ineligible violated the Eighth Amendment prohibition against the arbitrary

[8]The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting Flores, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In Flores, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in State v. Starnes, supra, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

infliction of the death penalty.[9] He specifically argues the failure to inform the jury of his parole ineligibility prevented him from presenting mitigating evidence in support of a sentence less than death and diminished the reliability of the jury's sentencing decision. In light of the new sentencing statute, he asks the Court to reconsider its policy prohibiting the trial judge from informing the jury a capital defendant is parole ineligible.

Initially, we note this issue is not properly preserved for appellate consideration. After the trial judge responded to the jury's question, appellant stated he excepted "on the basis of the Eighth Amendment." He offered no explanation or argument in support of the exception. Appellant's objection to the supplemental instruction is simply too vague for the Court to review. State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (general objection leaves nothing for Court to review). Clearly, appellant never argued, as he does now, that the Eighth Amendment requires a charge on parole ineligibility as mitigating evidence and to ensure the reliability of the sentence imposed. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge).

In any event, the Eighth Amendment requires that a death sentence not be imposed arbitrarily. Jones v. United States, 527 U.S. 373 (1999). It prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty. Payne v. Tennessee, 501 U.S. 808, 822 (1991), citing Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). The United States Supreme Court has "deferred to the State's choice of substantive factors relevant to the penalty determination." California v. Ramos, 463 U.S. 992, 1001 (1983). Whether parole eligibility is relevant to the sentencing determination is a matter of state law. Id.; see Simmons v. South Carolina, 512 U.S. 154, 176 (O'Connor, J., concurring) ("[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the

[9]U.S. Const. amend. VIII.

States.").[10]

In South Carolina, parole eligibility is not relevant to a jury's sentencing considerations. State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995) (defendant who was parole eligible after service of thirty years not entitled to charge on parole eligibility). The refusal to inform the jury of the capital defendant's parole eligibility does not violate the Eighth Amendment. Id.

Although we have never explicitly ruled whether the Eighth Amendment entitles a capital defendant to a charge informing the jury he is parole *in*eligible, precedent suggests no such instruction is required.[11] In State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Chandler, J., concurring), the Court held the defendant who was parole ineligible due to a prior conviction for a violent crime was not entitled to a charge informing the jury of his parole ineligibility. In State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994), cert. denied 513 U.S. 1166 (1995), overruled on other grounds State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995), we concluded there was no Eighth Amendment violation where the trial judge did not instruct the jury the defendant was parole ineligible but defense counsel argued "life imprisonment" means the defendant will never be released from prison. In Simmons v. South Carolina, 512 U.S. 154 (1994), the United States Supreme Court declined to hold the Eighth Amendment requires the jury to be informed a capital defendant is parole ineligible.

Relying on Skipper v. South Carolina, 476 U.S. 1 (1986), appellant asserts parole ineligibility is a mitigating circumstance of which the jury should have been informed. We disagree.

As noted above, the Eighth Amendment prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence."

[10]O'Dell v. Netherland, 521 U.S. 151, 165 (1997) ("[i]n Simmons, the Court carved out an exception to the general rule described in Ramos by, for the first time ever, requiring that a defendant be allowed to inform the jury of the postsentencing legal eventualities.").

[11]Appellant agrees there has been a blanket prohibition against any instruction on parole eligibility or ineligibility.

Payne v. Tennessee, 501 U.S. 808, 822 (1991). For purposes of the Eighth Amendment, mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. 1, 4, citing Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); see State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt). In Skipper, the Supreme Court held evidence of the defendant's good behavior while in jail awaiting trial was potentially mitigating because it indicated he would not pose a danger in the future. Accordingly, excluding evidence of the defendant's future adaptability violated the Eighth Amendment.

Unlike a defendant's behavior in prison, parole ineligibility is not an aspect of a defendant's character or record. Parole eligibility or ineligibility is a legislative determination; it is not mitigating evidence. See State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989), vacated on other grounds 493 U.S. 1013 (1990) (information regarding requirements for parole eligibility is not mitigating evidence); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. denied, 489 U.S. 1091 (1989) (punishment for a crime cannot serve as a mitigating sentencing consideration); see also State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (the general effect of capital punishment as a deterrent to crime is not a mitigating circumstance). The Eighth Amendment is not violated by refusing to inform the jury a capital defendant is parole ineligible.

Appellant asserts since all capital defendants are now parole ineligible, the Court should permit juries to be informed of parole ineligibility. He claims providing juries with accurate information on parole ineligibility will eliminate prejudicial misinformation juries hold concerning parole eligibility and produce more reliable sentencing determinations. We disagree.

Traditionally, in South Carolina it is the jury's duty and responsibility in the sentencing phase of a capital trial to impose a punishment authorized by law in consideration of the circumstances of the crime and the characteristics of the individual defendant. The jury is not authorized to legislate a plan of punishment. State v. Plath, 281 S.C. 1, 313

S.E.2d 619, cert. denied 467 U.S. 1265 (1984); see State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111 (1970), citing State v. White, 142 A.2d 65, 76 (N.J. 1958) ("the Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs."), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The jury's duty is the same under the new sentencing statute. While a defendant's parole ineligibility could affect the jury's decision, it nonetheless remains an irrelevant factor which the jury should not consider. Affirmatively mentioning an irrelevant factor would undermine the jury's decisionmaking process and result in a decision which is less, rather than more, reliable. As a matter of policy, we maintain it is inappropriate to inform the jury the capital defendant is parole ineligible. The Eighth Amendment does not compel a different result. Jones v. United States, 527 U.S. 373,___, 119 S.Ct. 2090, 2099 (1999) (a death sentence is not arbitrary within the meaning of the Eighth Amendment "if the jury is not given any bit of information that might possibly influence the individual juror's voting behavior.").

C.

Appellant argues the trial judge's supplemental instruction was erroneous. He contends 1) in responding to the jury's questions, the trial judge should have informed the jury he was parole ineligible, 2) the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," incorrectly suggested he was parole eligible, and 3) the trial judge erred by refusing to read that portion of the sentencing statute which referred to parole ineligibility. We disagree.

1.

As noted above, parole eligibility or ineligibility is not relevant to a capital jury's sentencing considerations and the issue of parole should not be injected into the jury's deliberations. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). When a *jury inquires* about parole, the trial court should instruct the jury it shall not consider parole eligibility in reaching its decision and the terms

"life imprisonment" and "death penalty" should be understood in their ordinary and plain meaning. State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).[12]

In keeping with Norris, the trial judge's supplemental instruction properly told the jury not to consider parole eligibility or ineligibility. Although Norris was decided prior to the new sentencing statute, we find no reason to require a different response when the jury inquires about parole.

Moreover, as noted above, three potential sentences were available: 1) death, 2) life imprisonment, or 3) a mandatory minimum thirty year sentence. Appellant was not eligible for parole under any of these sentences.[13] Nonetheless, as suggested by appellant, by asking for information on parole, the jury was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment. Informing the jury appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

2.

Furthermore, contrary to appellant's argument, the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," did not suggest appellant was parole *eligible*. Unlike the admonitions in Simmons v. South Carolina, 512 U.S. 154 (1994), "you are not to consider parole" and parole "is not a proper issue for your consideration," the instruction here specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole

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[12]In Ard we held the trial judge's erroneous mention of parole was harmless. To the extent Ard suggests the trial judge should charge the jury on parole eligibility if requested by the defendant, it is overruled. We note Ard was decided eight months after the present case was tried.

[13]But see footnote 7.

eligible.

3.

Finally, in response to the jury's questions, appellant requested the trial judge read that portion of the sentencing statute highlighted below:

> A person who is convicted of or pleads guilty to murder must be punished by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. **If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, 'life imprisonment' means until the death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.** No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.

Section 16-3-20(A) (Supp. 1998).

We find no error or prejudice from the trial judge's refusal to read the highlighted portion of the statute. Again, neither parole eligibility nor parole ineligibility are proper considerations for the jury. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Furthermore, appellant's suggestion that providing the jury with the highlighted language would promote "truth-in-sentencing" is

tenuous. The highlighted text provides the jury with only those portions of the sentencing statute which appellant deems favorable but excludes any reference to other less favorable sentencing options.

We conclude the supplemental instruction was appropriate.

II.

Appellant argues he was deprived of his right to make religious arguments to the jury. We disagree.

Over appellant's objection, the trial judge granted the State's motion to prohibit references to the Bible or religion during closing argument by both the prosecution and defense. Appellant proffered several religious arguments he had considered including in his closing argument.

In his closing argument, appellant stated:

> There's a story about a woman who broke the law a long, long, long time ago. Before we had electricity, before we had lethal injection, we still had the death penalty. There was a time that she had been caught, she was caught for breaking the law, and the people in her community gathered around her, and they were going to kill her for what she had done. They had the objects they were going to use to kill her in their hands, and she stood before them. Somebody walked in and said 'I'm not denying that what she did was wrong, this isn't about what she did was wrong, this is about what statement are you going to make about being confronted with this.'
>
> The story that I referenced, a very great man discussed with them about not killing the woman, and they didn't.

We find no error in the trial judge's ruling. Previously, we have held there is no fundamental unfairness when the trial judge precludes the solicitor and the defense from arguing about God or religion. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied 522 U.S. ___, 118 S.Ct. 146 (1997). In any event, the record clearly demonstrates appellant was not prejudiced by the trial judge's ruling. Although he was not permitted to

make all of his religious arguments, appellant conveyed the Biblical story of Jesus and the adulterous woman. State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (capital defendant was not prejudiced by sustained objection to his religious argument where record indicated he made the argument nonetheless). The trial judge did not abuse his discretion in granting the State's motion to prohibit references to the Bible or religion during both the prosecution and defense closing arguments. See State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986)[14] (trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed).

III.

In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.

In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).[15] Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.

Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general

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[14]Overruled on other grounds Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Casey, 305 S.C. 445, 409 S.E.2d 391 (1991).

[15]Because the General Assembly has approved the propriety of capital punishment, evidence attempting to establish its effectiveness or ineffectiveness as an instrument of deterrence is irrelevant.

deterrence. See State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied 519 U.S. ___, 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge general deterrence need not be considered); State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), cert. denied 471 U.S. 1036 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatedly allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168, cert. denied 498 U.S. 1074 (1990); State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied 462 U.S. 1124 (1983), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

PROPORTIONALITY REVIEW

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance is supported by the evidence. See S.C. Code Ann. § 16-3-25 (1985). Further, we hold the death penalty is neither excessive nor disproportionate to that imposed in similar cases. See State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997), cert. denied, 523 U.S. ___, 118 S.Ct. 1674 (1998); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. ___, 118 S.Ct. 146 (1997); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, cert. denied, 520 U.S. ___, 117 S.Ct. 2460 (1996); State v. Humphries, 325 S.C. 28, 479 S.E.2d 52, cert. denied, 520 U.S. ___, 117 S.Ct. 2441 (1996); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied, 519 U.S. ___, 117 S.Ct. 695 (1997); State v.

Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), cert. denied, 502 U.S. 1103 (1992).

AFFIRMED.

MOORE, WALLER, JJ., and Acting Justice Thomas C. Buff, concur. FINNEY, C.J., dissenting in a separate opinion.

FINNEY, C.J.: I respectfully dissent, and would reverse and remand for a new sentencing proceeding.

Under the 1996 amendments to S.C. Code Ann. § 16-3-20, all capital defendants face one of three sentences:

> (1) death; or
>
> (2) life in prison until death; or
>
> (3) unconditional release after service of a minimum term of thirty years, with no possibility of parole.[1]

Appellant contends that since he was parole ineligible as a matter of state law, the jury was entitled to be charged this fact when they inquired. I agree.

The majority deems the holding in Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994), inapplicable because appellant's sentencing options were not limited to death or life without

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[1]In this opinion and in State v. Starnes, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000), the Court has avoided directly deciding the parole eligibility status of a capital defendant who receives a term of years sentence. In my opinion, we must decide this question today in order to address the jury charge issues raised by appellant. The murder statute is clear as to certain defendants: "No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole. . . or any other credits which would reduce the mandatory minimum term of imprisonment for thirty years required by this section." § 16-3-20(A) (Supp. 1999). Since the murder statute is silent as to the parole eligibility of defendants receiving a sentence in excess of the mandatory minimum, the general rule controls. Under § 16-1-10(d)(Supp. 1999), murder is exempt from the classification system, and under § 24-13-100 (Supp. 1999), persons convicted of exempt offenses are ineligible for parole. Thus, although a capital defendant may receive a sentence of a term of years, he is ineligible for parole whatever the duration of that term.

possibility of parole, and cites a number of cases in support of this proposition. In all the cited cases except one, however, the defendant's sentencing possibilities included one in which he would be parole eligible. The only case in which the defendant did not face a potential parolable sentence was United States v. Flores, 63 F.3d 1342 (5th Cir. 1995). Flores involves a federal conviction, and parole has been abolished in the federal system. It is inapposite to the present South Carolina sentencing scheme, as are all the other cases cited. While I concede that Simmons does not directly control this case[2], the overriding principle to be drawn from that decision is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected. Here, the jury's inquiry prompted a misleading response which suggested parole was a possibility. In my opinion, due process mandates reversal.

Further, if the decision whether to inform juries which inquire about parole eligibility is simply one of policy, as the majority suggests in Part I C, then why not adopt a policy which gives the jurors the simply truth: no parole. The majority acknowledges, as it must,[3] that parole considerations "could" affect a jury's sentencing decision,[4] but then deems it "irrelevant" and denigrates its importance as "[a] bit of information that might possibly influence the individual juror's voting behavior." The specter of parole haunts every capital sentencing proceeding in this State, and I cannot understand why, given the simplicity of our new sentencing scheme in which no capital defendant is ever parole eligible, we would make a policy decision prohibiting the dissemination of the truth.

Of course, I would not stop with a charge that the defendant was

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[2]We are not concerned with whether a Simmons charge was warranted at the initial charge to the jury since future dangerousness was not an issue, but rather with the procedure to be followed when a capital jury inquires about parole.

[3]Given the regularity with which capital juries inquire about parole, we cannot deny its role in sentencing.

[4]See Bowers, Vandiver & Dugan, *A New Look at Public Opinion On Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J.Crim.L. 77 (1994).

not parole eligible, for that is only half the truth. I would tell the jury that if no aggravating circumstance is found, the defendant faces a minimum of thirty years without possibility of early release, but that if aggravating circumstances are found, then the alternatives are death or life in prison until death.

For these reasons, and with instructions that henceforth juries which inquire shall be charged the truth about sentencing, I would reverse and remand for a new sentencing proceeding in this matter.

The Supreme Court of South Carolina

The State, Respondent,

v.

Wesley Aaron Shafer, Jr., Petitioner.

ORDER

This Court recently affirmed petitioner's murder conviction and his death sentence. State v. Shafer, Op. No. 25120 (S.C. Sup. Ct. filed May 8, 2000)(Shearouse Adv. Sh. No. 18 at 35). Petitioner has now filed a consent motion seeking a stay of remittitur and a stay of execution to allow him to file a petition for a writ of certiorari with the United States Supreme Court. Respondent agrees that petitioner is entitled to a stay of execution since petitioner's proposed questions are appropriate for inclusion in a petition for a writ of certiorari to the United States Supreme Court. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996).

Petitioner's request for a stay of remittitur is denied. Petitioner's

request for a stay of execution is granted. The stay of execution shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases.

IT IS SO ORDERED.

A.C.J.

J.

J.

J.

Toal, C.J., not participating

Columbia, South Carolina

June 6, 2000

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and

the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445;

(h) physical torture; or

(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for

thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

Shearouse Adv. Sh. No.
S.E. 2d

THE STATE OF SOUTH CAROLINA

In The Supreme Court

State of South Carolina, Respondent,

v.

Wesley Aaron Shafer,

Jr., Appellant.

Appeal From Union County

John C. Hayes, III, Circuit Court Judge

Opinion No. 25120

Heard October 7, 1999- Filed May 8, 2000

AFFIRMED

David I. Bruck, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Solicitor Thomas E.Pope, of York, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Ray Broome while attempting to rob the convenience store where Broome was

working. Appellant maintained the killing was without malice.[1] A jury convicted appellant of murder, attempted armed robbery, and conspiracy. He was sentenced to death for murder and consecutive terms of twenty years' imprisonment and five years' imprisonment, respectively, for attempted armed robbery and conspiracy.[2] Appellant appeals.

FACTS

Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.

At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.

Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned

outside.

Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the

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[1]During the penalty phase of trial, appellant's expert witness testified appellant shot Broome in response to a lifetime of abuse and violence.

[2]The jury found the statutory aggravating circumstance of murder while in the commission of an attempted armed robbery while armed with a deadly weapon. S.C. Code Ann. §16-3-20(C)(a)(1)(d) (Supp. 1998).

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register counter, and shot Broome a second time.[3]Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.

Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store, found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head.[4] Broome died at the hospital.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him, and I'm the one that had the gun, and I guess I just snapped."

ISSUES[5]

I. Did the trial court err by refusing to instruct the jury appellant was parole ineligible?

II. Did the trial judge err by granting the State's motion to prohibit both the prosecution and defense from referring to the Bible or using religious references during closing argument?

III. Did the trial judge err by refusing to allow appellant to reopen the record to present evidence on deterrence or, alternatively, for a curative instruction after the solicitor argued

[3]Appellant waited eight seconds before firing the second shot.

[4]All the events inside the Hot Spot were recorded on the store's security camera.

[5]All issues stem from the sentencing phase of appellant's trial.

the general deterrent effect of the death penalty?

DISCUSSION

I.

Appellant argues, for various reasons, the trial court erred by refusing to instruct the jury he was parole ineligible. We disagree.

After closing arguments, relying on *Simmons v. South Carolina*, 512 U.S. 154 (1994), appellant requested the trial court instruct the jury he would be ineligible for parole. The trial court denied the request.

Thereafter, the trial judge instructed the jury "life imprisonment means until the death of the defendant." He later stated: "[i]n deciding whether to sentence the defendant to death or to life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death."

After three and one-half hours of deliberation, the jury returned with the following questions:

1. Is there any remote chance for someone convicted of murder to become eligible for parole?

2. Under what conditions would someone convicted for murder be eligible?

Regarding Question 1, appellant agreed the trial court should instruct the jury "life imprisonment means until the death of the offender" and requested the court read the portion of §16-3-20(A) which explains no person sentenced to life imprisonment is eligible for parole or any other form of release or credits which would reduce a life sentence. Appellant stipulated Question 2 could not be answered. After the trial judge informed the parties of his intended response to the jury's questions, appellant requested the trial

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judge delete any reference to parole eligibility.[6]

The trial judge responded to the jury's questions as follows:

Your consideration is restricted to what sentence to recommend.

I will remind you that what you recommend is what I will impose as trial judge. Section 16-3-20 of our Code of Laws as applies to this case in the process we're in states that, 'for the purposes of this section life imprisonment means until the death of the offender.' Parole eligibility or ineligibility is not for your consideration.

Appellant excepted stating, "we would renew our objection under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the State and Federal Constitutions." The trial judge noted the exception.

A.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends *Simmons* mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. *Id.; State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in

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[6]The trial judge stated he would charge the jury as follows: "[y] our consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16-3-20 of the South Carolina Code of Laws provides that for the purpose of this section life

imprisonment means until the death of the offender. Parole eligibility is not for your consideration."

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his view, would not pose a future danger to society." *Simmons* , 512 U.S. at 165 (1994) (plurality opinion).

Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. §16-3-20 (Supp. 1998). Under the new sentencing scheme, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. We recently held *Simmons* is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. *State v. Starnes*, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 17).[7] Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues *Simmons* mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read *Simmons* so narrowly. By its own terms, *Simmons* requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to the defend: nt. *Simmons,* U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death *under state law* was life imprisonment without the possibility of parole. . ."). (emphasis added). This interpretation is supported by decisions from other jurisdictions. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999) (*Simmons* is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995), *cert. denied*, 519 U.S. 825 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and,

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[7]In *Starnes*, we suggested, under the terms of the statute, it is arguable a defendant could be sentenced to more than thirty years and be

eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

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therefore *Simmons* is inapplicable); *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994); *cert. denied*, 514 U.S. 1108 (1995) (Simmons applies where capital defendant is ineligible for parole as a matter of law; *Simmons* does not apply even if it is unlikely defendant would be paroled); *People v. Simpson*, 665 N.E.2d 1228 (Ill.), *cert. denied,* 519 U.S. 982 (1996) (*Simmons* inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); *State v. McLaughlin*, 462 S.E.2d 1(N.C. 1995), cert. denied, 516 U.S. 1133 (1996) (*Simmons* inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, *Simmons* was inapplicable.[8]

B.

Appellant contends the failure to inform the jury he was parole ineligible violated the Eighth Amendment prohibition against the arbitrary

[8]The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting *Flores*, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In *Flores*, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in *State v. Starnes*, *supra*, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

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infliction of the death penalty.[9] He specifically argues the failure to inform the jury of his parole ineligibility prevented him from presenting mitigating evidence in support of a sentence less than death and diminished the reliability of the jury's sentencing decision. In light of the new sentencing statute, he asks the Court to reconsider its policy prohibiting the trial judge from informing the jury a capital defendant is parole ineligible.

Initially, we note this issue is not properly preserved for appellate consideration. After the trial judge responded to the jury's question, appellant stated he excepted "on the basis of the Eighth Amendment." He offered no explanation or argument in support of the exception. Appellant's objection to the supplemental instruction is simply too vague for the Court to review. *State v. Bailey*, 253 S.C. 304, 170 S.E.2d 376 (1969) (general objection leaves nothing for Court to review). Clearly, appellant never argued, as he does now, that the Eighth Amendment requires a charge on parole ineligibility as mitigating evidence and to ensure the reliability of the sentence imposed. *McKissick v. J.F. Cleckley & Co.*, 325

S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge).

In any event, the Eighth Amendment requires that a death sentence not be imposed arbitrarily. *Jones v. United States,* 527 U.S. 373 (1999). It prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty. *Pane v. Tennessee,* 501 U.S. 808, 822 (1991), *citing Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The United States Supreme Court has "deferred to the State's choice of substantive factors relevant to the penalty determination." *California v. Ramos*, 463 U.S. 992, 1001(1983). Whether parole eligibility is relevant to the sentencing determination is a matter of state law. *Id.; see Simmons v. South Carolina*, 512 U.S. 154, 176 (O'Connor, J., concurring) ("[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the

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[9]U.S. Const. amend. VIII.

States.").[10]

In South Carolina, parole eligibility is not relevant to a jury's sentencing considerations. *State v. Young*, 319 S.C. 33, 459 S.E.2d 84 (1995) (defendant who was parole eligible after service of thirty years not entitled to charge on parole eligibility). The refusal to inform the jury of the capital defendant's parole eligibility does not violate the Eighth Amendment. *Id.*

Although we have never explicitly ruled whether the Eighth Amendment entitles a capital defendant to a charge informing the jury he is parole *in*eligible, precedent suggests no such instruction is required.[11] In *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (Chandler, J., concurring), the Court held the defendant who was parole ineligible due to a prior conviction for a violent crime was not entitled to a charge informing the jury of his parole ineligibility. In *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied* 513 U.S. 1166 (1995), *overruled on other grounds State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995), we concluded there was no Eighth Amendment violation where the trial judge

did not instruct the jury the defendant was parole ineligible but defense counsel argued "life imprisonment" means the defendant will never be released from prison. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the United States Supreme Court declined to hold the Eighth Amendment requires the jury to be informed a capital defendant is parole ineligible.

Relying on *Skipper v. South Carolina*, 476 U.S. 1 (1986), appellant asserts parole ineligibility is a mitigating circumstance of which the jury should have been informed. We disagree.

As noted above, the Eighth Amendment prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence."

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[10] *O'Dell v. Netherland*, 521 U.S. 151, 165 (1997) ("[i]n *Simmons*, the Court carved out an exception to the general rule described in *Ramos* by, for the first time ever, requiring that a defendant be allowed to inform the jury of the postsentencing legal eventualities.").

[11] Appellant agrees there has been a blanket prohibition against any

instruction on parole eligibility or ineligibility.

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Payne v. Tennessee, 501 U.S. 808, 822 (1991). For purposes of the Eighth Amendment, mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Skipper v. South Carolina,* 476 U.S. 1, 4, *citing Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *see State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt). In *Skipper*, the Supreme Court held evidence of the defendant's good behavior while in jail awaiting trial was potentially mitigating because it indicated he would not pose a danger in the future. Accordingly, excluding evidence of the defendant's future adaptability violated the Eighth Amendment.

Unlike a defendant's behavior in prison, parole ineligibility is not an aspect of a defendant's character or record. Parole eligibility or

ineligibility is a legislative determination; it is not mitigating evidence. *See State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989), *vacated on other grounds* 493 U.S. 1013 (1990) (information regarding requirements for parole eligibility is not mitigating evidence); *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988), *cert. denied*, 489 U.S. 1091(1989) (punishment for a crime cannot serve as a mitigating sentencing consideration); *see also State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (the general effect of capital punishment as a deterrent to crime is not a mitigating circumstance). The Eighth Amendment is not violated by refusing to inform the jury a capital defendant is parole ineligible.

Appellant asserts since all capital defendants are now parole ineligible, the Court should permit juries to be informed of parole ineligibility. He claims providing juries with accurate information on parole ineligibility will eliminate prejudicial misinformation juries hold concerning parole eligibility and produce more reliable sentencing determinations. We disagree.

Traditionally, in South Carolina it is the jury's duty and responsibility in the sentencing phase of a capital trial to impose a

punishment authorized by law in consideration of the circumstances of the crime and the characteristics of the individual defendant. The jury is not authorized to legislate a plan of punishment. *State v. Plath*, 281 S.C. 1, 313

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S.E.2d 619, *cert. denied* 467 U.S. 1265 (1984); *see State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111(1970), *citing State v. White*, 142 A.2d 65, 76 (N.J. 1958) ("the Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs."), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). The jury's duty is the same under the new sentencing statute. While a defendant's parole ineligibility could affect the jury's decision, it nonetheless remains an irrelevant factor which the jury should not consider. Affirmatively mentioning an irrelevant factor would undermine the jury's decisionmaking process and result in a decision which is less, rather than more, reliable. As a matter of policy, we maintain it is inappropriate to inform the jury the capital defendant is parole

ineligible. The Eighth Amendment does not compel a different result. *Jones v. United States*, 527 U.S. 373,__, 119 S.Ct. 2090, 2099 (1999) (a death sentence is not arbitrary within the meaning of the Eighth Amendment "if the jury is not given any bit of information that might possibly influence the individual juror's voting behavior.").

C.

Appellant argues the trial judge's supplemental instruction was erroneous. He contends 1) in responding to the jury's questions, the trial judge should have informed the jury he was parole ineligible, 2) the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," incorrectly suggested he was parole eligible, and 3) the trial judge erred by refusing to read that portion of the sentencing statute which referred to parole ineligibility. We disagree.

1.

As noted above, parole eligibility or ineligibility is not relevant to a capital jury's sentencing considerations and the issue of parole should not be injected into the jury's deliberations. *State v. Ard*, 332 S.C. 370, 505

S.E.2d 328 (1998); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d. 315 (1991). When a *jury inquires* about parole, the trial court should instruct the jury it shall not consider parole eligibility in reaching its decision and the terms

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"life imprisonment" and "death penalty" should be understood in their ordinary and plain meaning. *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).[12]

In keeping with *Norris*, the trial judge's supplemental instruction properly told the jury not to consider parole eligibility or ineligibility. Although *Norris* was decided prior to the new sentencing statute, we find no reason to require a different response when the jury inquires about parole.

Moreover, as noted above, three potential sentences were

available: 1) death, 2) life imprisonment, or 3) a mandatory minimum thirty year sentence. Appellant was not eligible for parole under any of these sentences.[13] Nonetheless, as suggested by appellant, by asking for information on parole, the jury was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment. Informing the jury appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

2.

Furthermore, contrary to appellant's argument, the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," did not suggest appellant was parole *eligible*. Unlike the admonitions in *Simmons v. South Carolina*, 512 U.S. 154 (1994), "you are not to consider parole" and parole "is not a proper issue for your consideration," the instruction here specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole

[12] In *Ard* we held the trial judge's erroneous mention of parole was harmless. To the extent *Ard* suggests the trial judge should charge the jury

on parole eligibility if requested by the defendant, it is overruled. We note *Ard* was decided eight months after the present case was tried.

[13] *But see* footnote 7.

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eligible.

3.

Finally, in response to the jury's questions, appellant requested the trial judge read that portion of the sentencing statute highlighted below:

A person who is convicted of or pleads guilty to murder must be punished by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. *If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt*

pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, `life imprisonment' means until the death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.

Section 16-3-20(A) (Supp. 1998).

We find no error or prejudice from the trial judge's refusal to read the highlighted portion of the statute. Again, neither parole eligibility nor parole ineligibility are proper considerations for the jury. *State v. Ard*,

332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Furthermore, appellant's suggestion that providing the jury with the highlighted language would promote "truth-in-sentencing" is

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tenuous. The highlighted text provides the jury with only those portions of the sentencing statute which appellant deems favorable but excludes any reference to other less favorable sentencing options.

We conclude the supplemental instruction was appropriate.

II.

Appellant argues he was deprived of his right to make religious arguments to the jury. We disagree.

Over appellant's objection, the trial judge granted the State's motion to prohibit. references to the Bible or religion during closing argument by both the prosecution and defense. Appellant proffered several religious arguments he had considered including in his closing argument.

In his closing argument, appellant stated:

There's a story about a woman who broke the law a long, long, long time ago. Before we had electricity, before we had lethal injection, we still had the death penalty. There was a time that she had been caught, she was caught for breaking the law, and the people in her community gathered around her, and they were going to kill her for what she had done. They had the objects they were going to use to kill her in their hands, and she stood before them. Somebody walked in and said 'I'm not denying that what she did was wrong, this isn't about what she did was wrong, this is about what statement are you going to make about being confronted with this.'

The story that I referenced, a very great man discussed with them about not killing the woman, and they didn't.

We find no error in the trial judge's ruling. Previously, we have held there is no fundamental unfairness when the trial judge precludes the solicitor and the defense from arguing about God or religion. *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied* 522 U.S.__ , 118 S.Ct. 146 (1997). In any event, the. record clearly demonstrates appellant was not prejudiced by the trial judge's ruling. Although he was not permitted to

make all of his religious arguments, appellant conveyed the Biblical story of Jesus and the adulterous woman. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997) (capital defendant was not prejudiced by sustained objection to his religious argument where record indicated he made the argument nonetheless). The trial judge did not abuse his discretion in granting the State's motion to prohibit references to the Bible or religion during both the prosecution and defense closing arguments. *See State v. Patrick*, 289 S.C.

301, 345 S.E.2d 481 (1986)[14](trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will riot be disturbed).

III.

In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.

In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996).[15]Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect c f the death penalty.

Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general

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[14]*Overruled on other grounds Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *State v. Casey,* 305 S.C. 445, 409 S.E.2d 391(1991).

[15]Because the General Assembly has approved the propriety of capital punishment, evidence attempting to establish its effectiveness or ineffectiveness as an instrument of deterrence is irrelevant.

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deterrence. *See State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), *cert. denied* 519 U.S.__ , 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); *State v. Longworth*, 313 S.C. 360, 438 S.E.2d 219 (1993), *cert. denied* 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge

general deterrence need not be considered); *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied* 471 U.S. 1036 (1985), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatediy allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. *State v. Truesdale*, 301 S.C. 546, 393 S.E.2d 168, *cert. denied* 498 U.S. 1074 (1990); *State v. Jones*, 298 S.C. 118, 378 S.E.2d 594 (1989); *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied* 462 U.S. 1124 (1983), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

PROPORTIONALITY REVIEW

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance is supported by the evidence. *See* S.C. Code Ann.§16-3-25 (1985). Further, we hold the death penalty is neither excessive nor disproportionate to that imposed in similar cases. *See State v. Hughes*, 328 S.C. 146, 493 S.E.2d. 821(1997), *cert. denied*, 523 U.S.__ , 118 S.Ct. 1674 (1998); *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied*, 522 U.S.__ , 118 S.Ct. 146 (1997); *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57, *cert. denied*, 520 U.S.__ , 117 S.Ct. 2460 (1996); *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52, *cert. denied*, 520 U.S.__ , 117 S.Ct. 2441 (1996); *State v. MeWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), *cert. denied*, 519 U.S.__, 117 S.Ct: 695 (1997); *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991), *cert. denied*, 502 U.S. 1103 (1992).

AFFIRMED.

MOORE, WALLER, JJ., and Acting Justice Thomas C. Huff,

concur. FINNEY, C.J., dissenting in a separate opinion.

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FINNEY, C.J.: I respectfully dissent, and would reverse and remand for a new sentencing proceeding.

Under the 1996 amendments to S.C. Code Ann. §16-3-20, all capital defendants face one of three sentences:

(1) death; or

(2) life in prison until death; or

(3) unconditional release after service of a minimum term of thirty years, with no possibility of parole.[1d]

Appellant contends that since he was parole ineligible as a matter of state law, the jury was entitled to be charged this fact when they inquired. I agree.

The majority deems the holding in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994), inapplicable because appellant's sentencing options were not limited to death or life without

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[1d] In this opinion and in *State v. Starnes*, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000), the Court has avoided directly deciding the parole eligibility status of a. capital defendant who receives a term of years sentence. In my opinion, we must decide this question today in order to address the jury charge issues raised by appellant. The murder statute is clear as to certain defendants: "No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole... or any other credits which would reduce the mandatory minimum term of imprisonment for thirty years required by this section." § 16-3-20(A) (Supp. 1999). Since the murder statute is silent as to the parole eligibility of defendants receiving a sentence in excess of the mandatory minimum, the general rule controls. Under §16-1-10(d)(Supp. 1999), murder is exempt from the classification system, and under § 24-13-100 (Supp. 1999), persons convicted of exempt offenses are ineligible for parole.

Thus, although a capital defendant may receive a sentence of a term of years, he is ineligible for parole whatever the duration of that term.

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possibility of parole, and cites a number of cases in support of this proposition. In all the cited cases except one, however, the defendant's sentencing possibilities included one in which he would be parole eligible. The only case in which the defendant did not face a potential parolable sentence was *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995). *Flores* involves a federal conviction, and parole has been abolished in the federal system. It is inapposite to the present South Carolina sentencing scheme, as are all the other cases cited. While I concede that *Simmons* does not directly control this case [2d], the overriding principle to be drawn from that decision is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected. Here, the jury's inquiry prompted a misleading response which suggested parole was a possibility. In my opinion, due process mandates reversal.

Further, if the decision whether to inform juries which inquire about parole eligibility is simply one of policy, as the majority suggests in Part I C, then why not adopt a policy which gives the jurors the simple truth: no parole. The majority acknowledges, as it must,[3d] that parole considerations "could" affect a jury's sentencing decision,[4d] but then deems it "irrelevant" and denigrates its importance as "[a] bit of information that might possibly influence the individual juror's voting behavior." The specter of parole haunts every capital sentencing proceeding in this State, and I cannot understand why, given the simplicity of our new sentencing scheme in which no capital defendant is ever parole eligible, we would make a policy decision prohibiting the dissemination of the truth.

Of course, I would not stop with a charge that the defendant was

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[2d] We are not concerned with whether a *Simmons* charge was warranted at the initial charge to the jury since future dangerousness was not an issue, but rather with the procedure to be followed when a capital jury inquires about parole.

[3d] Given the regularity with which capital juries inquire about parole,

we cannot deny its role in sentencing.

[4d]See Bowers, Vandiver & Dugan, *A New Look at Public Opinion On Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J.Crim.L. 77 (1994).

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not parole eligible, for that is only half the truth. I would tell the jury that if no aggravating circumstance is found, the defendant faces a minimum of thirty years without possibility of early release, but that if aggravating circumstances are found, then the alternatives are death or life in prison until death.

For these reasons, and with instructions that henceforth juries which inquire shall be charged the truth about sentencing, I would reverse and remand for a new sentencing proceeding in this matter.

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EDITOR'S NOTE

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SUPREME COURT, U.S.
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No. 00-5250 (3)

October Term, 2000

IN THE SUPREME COURT OF THE UNITED STATES

WESLEY AARON SHAFER, JR.,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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CAPITAL CASE

PETITIONER'S QUESTIONS PRESENTED

1.

Whether petitioner's due process rights under Simmons v. South Carolina, 512 U.S. 154 (1994), were violated by the trial court's refusal to instruct the sentencing jury that "under South Carolina law, [petitioner] would be ineligible for parole if the jury were to vote for a life sentence," Ramdass v. Angelone, 120 S.Ct. 2113, 2119 (2000) (plurality opinion), and by the South Carolina Supreme Court's holding that Simmons no longer applies to South Carolina's capital sentencing scheme.

2.

Whether prosecutors' capital sentencing arguments based on general deterrence violate due process when state law immunizes them from evidentiary rebuttal.

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I. Since under South Carolina's sentencing scheme there was legally available to Petitioner a definite term sentence as an alternative to death and life without parole, the South Carolina Supreme Court properly ruled that Simmons v. South Carolina was not triggered; in any event, the state did not rely on Petitioner's future dangerousness. 9

A. How the federal question was raised and decided below 9

1. Events at trial 9

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B. Unlike the South Carolina's old sentencing scheme addressed in Simmons v. South Carolina, which provided for parole eligibility for murderers sentenced to life, the sentencing scheme under which Petitioner was tried provided for three options: death, life without parole, and a mandatory minimum sentence of at least thirty years. 15

C. This Court's recent decision in Ramdass v. Angelone. 17

D. Since no other statutory provision required that Petitioner be sentenced to life without parole if not sentenced to death, then Petitioner could have received as little as a definite term sentence of thirty years; thus,

life without parole was not the only available alternative sentence, and Simmons was inapplicable. 19

E. The prosecution did not argue future dangerousness; thus, the rule in Simmons was not triggered. 29

II. The exclusion of evidence on the deterrent effect of the death penalty does not violate due process where both the state and the defense have equal opportunity to argue their respective views on the issue. 34

A. How the federal question was raised and decided below 34

1. Events at trial 34

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B. Since Petitioner had as much an opportunity in argument to "deny or explain" the general deterrent effect of the death penalty as the state did to assert it, there was no violation of due process. 35

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Respondent, State of South Carolina, hereby makes a Brief in Opposition to the Petition for a Writ of Certiorari to the South Carolina Supreme Court filed by Wesley Aaron Shafer, Jr., who has been convicted in the South Carolina courts and sentenced to death. Respondent would show this Court the following:

CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina is as of the date of this Brief not yet reported in the South Carolina or Southeastern Reporters. The opinion is reprinted and attached to this Brief as Appendix A, and also is available on WESTLAW as State v. Shafer, Op. No. 25120, 2000 W.L. 576189 (S.C. filed May 8th, 2000). Also reprinted in the Appendix to this Brief is State v. Starnes, Op. No. 25119, 2000 W.L. 576191 (S.C. filed May 8th, 2000). Starnes is a companion case to Shafer which also decided the same issue pursuant to Simmons v. South Carolina, 512 U.S. 154 (1994).

JURISDICTION

The decision of the Supreme Court of South Carolina was entered on May 8th, 2000. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257, Petitioner having asserted below, and asserting herein, deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

1. The Fourteenth Amendment to the United States Constitution, which forbids, in pertinent part, the deprivation of "life, liberty, or property, without due process of law."

2. Section 16-3-20 of the Code of Laws of South Carolina, which is reprinted in

the Appendix to this Brief.

RESPONDENT'S STATEMENT OF THE CASE

Petitioner, Wesley Aaron Shafer, Jr., is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Union County. In May 1997, the Union County Grand Jury indicted Appellant Wesley Aaron Shafer for murder, attempted armed robbery and conspiracy. Specifically, the murder indictment alleged that, on April 13, 1997, Appellant shot Ray Broome in the head with malice aforethought. The state made notice of intent to seek the death penalty, and served notice of evidence in aggravation.

Appellant was represented at trial by Public Defender William All, as well as Attorneys Leon Banks and William Nettles. The state was represented at trial by Solicitor Thomas E. Pope, Deputy Solicitor Kevin S. Brackett, and Assistant Solicitor Betty Miller. Judge John C. Hayes conducted a jury trial in Union County beginning on January 12, 1998. On January 18, 1998, the trial jury convicted appellant of all charges.

The sentencing hearing began the next day. After presentation of the evidence, the trial judge charged the following statutory aggravating factor:

> A murder was committed while in the commission of an attempted armed robbery while armed with a deadly weapon.

The judge charged the following statutory mitigating circumstances:

> 1. The defendant has no significant history of a prior criminal conviction involving the use of violence against another person.
>
> 2. The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> 3. The capacity of the defendant to appreciate the criminality of his conduct,

or to conform his conduct to the requirement of the law was substantially impaired.

4. The age and mentality of the defendant at the time of the crime.

The judge also instructed the jury that it could consider non-statutory mitigating circumstances supported by the evidence.

On January 21, 1998, the jury found the aggravating circumstance and recommended that Appellant be sentenced to death for the murder. The trial judge imposed the death sentence the same day, along with consecutive sentences of twenty and five years for the attempted armed robbery and conspiracy charges respectively.

Appellant timely filed notice of appeal. In the direct appeal to the South Carolina Supreme Court, Petitioner was represented by David I. Bruck, Esquire. Assistant Attorney General S. Creighton Waters, Esquire, represented Respondent. Both parties filed briefs in the appeal, and the following issues were presented by Petitioner:

I. The trial court's incomplete and misleading response to the jury's question about parole eligibility renders his death sentence fundamentally unfair.

II. The trial court's refusal to allow Appellant to present evidence to rebut the prosecution's argument concerning the supposed general deterrent effect of the death penalty, together with the denial of a curative instruction, denied Appellant due process of law.

III. The trial court erred in granting the state's request for a blanket prohibition of all religious or biblical references during defense counsel's sentencing phase closing arguments.

The South Carolina Supreme Court heard oral argument on October 7th, 1999, and the court issued its opinion affirming Petitioner's conviction and sentence on May 8th, 2000. State v. Shafer, Op. No. 25120, 2000 W.L. 576189 (S.C. filed May 8th, 2000). On May 24th, 2000, Attorney Bruck filed on behalf of Petitioner a "Consent Motion for Stay of Execution".

The South Carolina Supreme Court on June 6th, 2000 granted the motion for stay of execution but denied Petitioner's motion to stay the Remittitur. The Remittitur was sent down on June 6th, 2000.

Petitioner filed his Petition for Writ of Certiorari with the United States Supreme Court on July 14th, 2000, and this Petition was docketed on July 20th, 2000.

RESPONDENT'S STATEMENT OF FACTS

Although the defense did argue against the presence of malice at trial, it is undisputed that Petitioner Wesley Shafer killed Ray Broome by shooting him twice in the head. The issues in this appeal only challenge the sentencing phase. The following briefly describes the evidence presented at trial.

Adam Mullinax, Shafer's cousin and a co-defendant, spent most of Saturday, April 12th, 1997, with Shafer and Justin Porter. **{R. 1161 ll. 18-63; 1154 l. 1 - 1159 l. 11}**. Mullinax testified that Shafer, who was wearing a Duke University jacket, showed off a pistol he kept in the jacket's outside pocket. **{R. 1159 l. 21 - 1161 l. 23}**. At about 7 p.m., Mullinax left Porter and Shafer and went to watch boxing. **{R. 1159 ll. 11-20; 1162 l. 17 - 1163 l. 12}**.

Later that Saturday night, a number of teenagers and young adults were "cruising" in the parking lot at the Hot Spot convenience store, a popular late-night hangout in Lockhart, South Carolina. **{R. 990 ll. 1 - 25; 1017 l. 18 - 1018 l. 12; 1024 l. 14 - 1025 l. 2}**. Ray Broome, the victim, was the third shift clerk at the Hot Spot. **{R. 941 ll. 13-20}**. Around 11:30 p.m., two men in a brown late-70's Ford pickup attracted attention by spinning the truck's wheels at the gas pumps. Jamie Gibson, who was hanging out at the

Hot Spot, recognized Justin Porter as the driver. The passenger, who Gibson did not know, was wearing a Duke University hooded jacket. After Porter and his passenger went in the store, those hanging out at the Hot Spot saw the two men again spin the truck's wheels while leaving. As the truck pulled away from the store, the passenger held his arm out of the window and fired several shots into the air with a handgun. **{R. 962 ll. 2-10; 990 l.17 - 996 l.10; 1011 l. 6 - 1013 l. 19; 1020 ll. 1-24; 1025 l. 3 - 1026 l. 11; 1039 l. 2 - 1040 l. 20; 1045 ll. 1-17; 1047 l. 7 - 1048 l. 11}**

At about midnight, Mullinax again met up with Porter and Shafer, and after the three drank a few beers, they decided to go to the Hot Spot for cigarettes. Upon arrival, Mullinax used the restroom in the store and returned outside to the Ford pickup. Shafer then pulled the hood on his head, and he and Porter entered the store around at about 1:00 a.m. **{R. 996 l. 22 - 1000 l. 10; 1013 ll. 10-19; 1162 l. 23 - 1168 l. 13}**.

What happened next was entirely captured on a video recorders hooked to the Hot Spot's security cameras. The videotape introduced at trial reflects Shafer walk in and shoot Broome in the head with a startling lack of warning. Eight seconds later, Shafer strolled over to the counter, leaned over it, and put another bullet into Broome's head as he lay on the floor. After attempting and failing to open the cash register, Shafer and Porter ran out the door. **{R. 963 l. 5 - 965 l. 11; 1168 l. 15 - 1170 l. 8}**.

Once back at the truck, Shafer jumped in the middle of the seat and ducked his head down on Mullinax's lap. While standing at the truck's door, Porter pulled a hat onto his head, fumbled around looking for the keys, and then started the truck and drove away. **{R. 1028 l. 4 - 1031 l. 3; 1041 l. 9 - 1043 l. 23; 1048 ll. 12-23; 1170 l. 9 - 1171 l. 11}**.

Meanwhile, Jamie Palmer, Monica Inman, and Jennifer Martin had pulled into the Hot Spot parking lot in time to watch Shafer and Porter run to the truck and escape. Although her friends were apprehensive, Palmer went inside the Hot Spot and found Broome lying on the floor behind the counter. She promptly dialed 911. While she was on the phone, her friends came inside and begged her to leave, saying, "They might come back, they might come back." **{R. 965 l.10; 1028 l. 4 - 1032 l. 20}**. Although Broome was still breathing when law enforcement and EMS arrived, emergency room personnel could not save him. **{R. 941 l. 21 - 943 l. 1; 975 l. 13 - 976 l. 16; 1503 l. 1 - 1506 l. 9; 1507 l. 12 - 1508 l. 9; 1511 l. 21-25}**.

After escaping from the Hot Spot, Shafer, Porter, and Mullinax returned to Porter's house. While Shafer was confident they would not be caught, he stated they need to get rid of their clothes. Shafer and Porter wrapped the murder weapon, which belonged to Shafer's father, in Mullinax's shirt and hid it under the seat in an old car behind the barn. The two then weighted Shafer's Duke University jacket with a rock, and put it into a nearby creek with their shirts and hats stuffed in the pockets. **{R. 1171 l. 5 - 1174 l. 4; 1108 l. 12 - 1110 l. 18; 1130 l. 15 - 1136 l. 2}**.

The girlfriend of one of the responding deputies was the cousin of Porter, and she and Jamie Palmer had a conversation the night of the incident. **{R. 977 l. 11 - 979 l. 9}**. As a result of this conversation, the police drove Palmer and Inman by Porter's house Sunday morning. The young women identified the Ford pickup parked in Porter's yard as the one involved in the incident. **{R. 979 l. 13 - 980 l. 25; 984 l. 13 - 987 l. 14; 1033 l. 20 - 1037 l. 14; 1053 l. 4 - 1059 l. 1}**.

The trail inevitably led to Shafer, and he was arrested that day. **{R. 1059 l. 2 - 1073 l. 1; 1079 l. 2 - 1102 l. 13}**. After initially denying knowledge of the gun's whereabouts, Shafer ultimately told officers where it was hidden. He also directed them to the location of the hidden jacket and a box of bullets. **{R. 1104 l. 3 - 1105 l. 1; 1108 l. 12 - 1110 l. 18; 1118 ll. 4-23; 1121 ll. 15-20; 1124 l. 7 - 1125 l. 9; }**. When asked by law enforcement why he shot Broome, Shafer replied that he had the gun and "just snapped." **{R. 1120 ll. 7-25; 1122 ll. 1-24; 1125 l. 23 - 1126 l. 7}**.

During the sentencing phase, the state introduced evidence that on October 9th, 1995, Shafer pled guilty to criminal sexual conduct with a minor 2nd and burglary 2nd. Shafer was part of a group of guys who broke into an empty mobile home and pressured, but did not force, two 12-year old girls to engage in sexual activity with them. Shafer did not always comply with the terms and conditions of his probation and home detention from that incident. **{R. 1446 l. 3 - 1455 l. 6}**. During that time he tested positive for marijuana, had another burglary 2nd charge, and was charged with driving under suspension and operating an uninsured vehicle. **{R. 1482 l. 1 - 1484 l. 14; 1488 ll. 5-17}**.

While in jail awaiting trial, prison staff caught Shafer with contraband, including a green leafy substance as well as cigarettes and a lighter. **{R. 1460 l. 3 - 1464 l. 22; 1478 l. 7 - 1480 l. 15}**. Shafer also was charged with simple assault after he angrily confronted a prison guard who turned off the outside phones at the end of recreation period. **{R. 1466 l. 12 - 1471 l. 17}**.

Robert Newton, who was in county jail with Shafer, testified that when Shafer told him about shooting Broome he did not seem bothered by it. According to Newton, Shafer

said that when Broome saw Shafer pointing the gun at him, he just looked back down at a clipboard. Shafer took this as a "smart comment", and fired the pistol. **{R. 1490 l. 5 - 1493 l. 13}**.

The state also presented testimony from various emergency personnel about the unsuccessful efforts to save Broome and the gut-wrenching ordeal of informing his family. **{R. 1502 l. 17 - 1514 l. 20}**. Broome's wife and son also testified about their loss. **{R. 1551 l. 9 - 1576 l. 24}**.

In mitigation, Shafer presented relatives and neighbors who generally testified about mental and physical abuse Shafer and his sister suffered at the hands of their father, Ricky. **{R. 1577 l. 19 - 1609 l. 25; 1650 l. 1 - 1680 l. 13; 1789 l. 1 - 1808 l. 10; 1850 l. 16 - 1861 l. 25}**. Dr. Patrick Goldsmith, a psychologist, testified about Shafer's alleged abuse, substance use, and resulting impulse control problems. He diagnosed Shafer with depression, and felt there was a "probability" he suffered post traumatic stress disorder in early childhood. **{R. 1615 l. 17 - 1644 l. 10}**.

Also testifying for Shafer was Lt. Col. David Grossman, who has a master's degree in psychology and who is the self-anointed founder of the discipline of "killology". Grossman theorized that years of abuse, watching violent movies, and playing violent video games had conditioned Shafer much in the "stimulus-response" manner which the military uses to train soldiers to kill the enemy. Thus, he generally asserted that Shafer had a "conditioned response" where if a target such as Broome presented himself, it would be "extraordinarily difficult" for Shafer not to shoot. **{R. 1681 l. 23 - 1786 l. 19}**.

In reply, the state presented testimony about one of the video games played by

Shafer and discussed by Grossman. The witness stated that although a player got points by shooting bad guys, the player lost a life if he shot the "innocent townsfolk." **{R. 1865 l. 6 - 1870 l. 20}**.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. Since under South Carolina's sentencing scheme there was legally available to Petitioner a definite term sentence as an alternative to death and life without parole, the South Carolina Supreme Court properly ruled that Simmons v. South Carolina was not triggered; in any event, the state did not rely on Petitioner's future dangerousness.

The statutory possibility that Appellant could have received a 30-year mandatory minimum sentence precludes the claim that the trial judge should have charged the sentencing jury that Appellant would get life without parole ["LWOP"] if the jury did not recommend death. In the alternative, the rule in Simmons v. South Carolina was not triggered because the prosecution did not rely on Petitioner's future dangerousness.

A. How the federal question was raised and decided below

1. Events at trial

At trial, the state sought an *in liminie* motion that parole ineligibility could not be mentioned under Simmons v. South Carolina because the state had not made future dangerousness at issue. Defense counsel first argued that the state could not use evidence of Appellant's character without using it for future dangerousness. The court found that as of yet, future dangerousness had not been argued, so he granted the state's motion. **{R. 1817 l. 17 - 1821 l. 9}**.

After the court indicated that it was charging what it thought was applicable from the murder statute, the defense made a motion to read from section 16-3-20. The court

denied this motion. The court granted the defense's request to charge life in prison means "until death of the offender." See S.C. Code Ann. § 16-3-20 (Supp. 1998). **{R. 1836 l. 14 - 1843 l. 15}**.

After the solicitor's sentencing phase closing argument, the defense argued that under Simmons future dangerousness was raised when the solicitor echoed the statement of one of those who found the victim, that "they might come back, they might come back." The solicitor stated he was merely arguing general deterrence, and the court agreed. **{R. 1893 l. 23 - 1894 l. 10}**.

The trial court then charged the jury as follows:

> THE COURT: I tell you that life imprisonment means until death of the defendant.
>
> * * *
>
> In deciding whether to sentence the defendant to death or life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death.

{R. 1919 ll. 15-16; 1926 ll. 12-15}.

Finally, during deliberation the jury sent a note asking the following two questions:

> (1) Is there any remote chance for someone convicted of murder to become eligible for parole?
>
> (2) Under what conditions would someone convicted for murder be eligible?

The state argued that under the Simmons v. South Carolina and its progeny, parole ineligibility does not need to be charged even if someone is parole ineligible, unless future dangerousness is argued. In response, defense counsel admitted that the "until death of the offender" language was an appropriate "baseline," and stipulated that the second question could not be answered. The defense further contended that since section 16-3-20 explained life imprisonment beyond "until death of the offender," then it should be

charged to the jury. Asserting that under the present 16-3-20 there are three clear options for the jury, the defense stated that it thought the jury should be charged that if they find an aggravator, Appellant would receive life without parole. Finally, Appellant argued that the judge should not include "parole eligibility is not for your consideration" in its response to the jury's question. The trial court ultimately charged the following:

> Section 16-3-20 of our Code of Laws as applies to this case in the process we're in, states that, quote, for the purposes of this section life imprisonment means until the death of the offender, end quote.
>
> Parole eligibility or ineligibility is not for your consideration.

{R. 1937 l. 22 - 1954 l. 13}.

2. The direct appeal to the South Carolina Supreme Court

In State v. Shafer, the South Carolina Supreme Court addressed the due process claim for a parole ineligibility charge as follows:

> Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends Simmons mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.
>
> When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. [Simmons v. South Carolina]; State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society." Simmons, 512 U.S. at 165 (1994) (plurality opinion).
>
> Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp.1998). Under the new sentencing scheme, a defendant can be sentenced to (1) death, (2) life without the possibility of parole, or (3) a mandatory minimum thirty year

> sentence. We recently held Simmons is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. State v. Starnes, Op. No. 25119 (S.C.Sup.Ct. filed May 8, 2000) (Shearouse Adv.Sh. No. 18 at 17). [FN7]
>
> [FN7] In Starnes, we suggested, under the terms of the statute, it is arguable that a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.
>
> Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.
>
> Appellant argues Simmons mandates a charge on parole ineligibility when the State argues future dangerousness and the jury's sentencing recommendation is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read Simmons so narrowly. By its own terms, Simmons requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is legally available to the defendant. Simmons, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole...".) (emphasis added). This interpretation is supported by decisions from other jurisdictions. Ramdass v. Angelone, 187 F.3d 396 (4th Cir.1999) (Simmons is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); United States v. Flores, 63 F.3d 1342 (5th Cir.1995), cert. denied, 519 U.S. 825, 117 S.Ct. 87, 136 L.Ed.2d 43 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and, therefore Simmons is inapplicable); Allridge v. Scott, 41 F.3d 213 (5th Cir.1994), cert. denied, 514 U.S. 1108, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995) (Simmons applies where capital defendant is ineligible for parole as a matter of law; Simmons does not apply even if it is unlikely defendant would be paroled); People v. Simpson, 172 Ill.2d 117, 216 Ill.Dec. 671, 665 N.E.2d 1228 (Ill.), cert. denied, 519 U.S. 982, 117 S.Ct. 436, 136 L.Ed.2d 334 (1996) (Simmons inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (N.C.1995), cert. denied, 516 U.S. 1133, 116 S.Ct. 956, 133 L.Ed.2d 879 (1996) (Simmons inapplicable where alternative to death is not life imprisonment without possibility of

> parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, Simmons was inapplicable.

State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *4-*5 (S.C. filed May 8th, 2000).

The Shafer court next ruled that Petitioner's Eighth Amendment claim for a parole ineligibility charge was not preserved for appeal. In the alternative, Shafer found a parole ineligibility charge was not required "mitigating evidence" under Skipper v. South Carolina, 476 U.S. 1 (1986), and, as a matter of state law, parole ineligibility "remain[ed] an irrelevant factor which the jury should not consider". State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *5-*6 (S.C. filed May 8th, 2000).

Shafer also addressed Petitioner's state law bases for his claim that after the jury's question the trial court should have charged Petitioner was parole ineligible. Shafer first noted that absent a Simmons issue, a jury's inquiry about parole should be handled in accordance with State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), which requires: (1) a charge that death and life imprisonment should be understood in their plain and ordinary meaning, and (2) a charge that parole eligibility should not be considered. State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *6 (S.C. filed May 8th, 2000). The court reiterated that Petitioner could possibly receive one of three possible sentences at the time of sentencing, and recognized that the jury's question meant it "was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment". Id. at *6. Thus, the court concluded:

> Informing the jury that appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

Id.

Next, Shafer rejected Petitioner's claim that parole eligibility was suggested by the judge's charge, "parole eligibility or ineligibility is not for your consideration". The court noted that unlike the charges in Simmons, this instruction "specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole eligible". State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *6 (S.C. filed May 8th, 2000).

Finally, Shafer disagreed with Petitioner's contention that portions of the sentencing statute highlighted below be read to the jury to define life imprisonment, because: (1) the Court had determined parole eligibility or ineligibility were not proper considerations for the jury, and (2) "the highlighted text provides the jury with only those portions Petitioner deems favorable but excludes any reference to other less favorable sentencing options". State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *6 (S.C. filed May 8th, 2000).

In State v. Starnes, the companion case to Shafer, the court discussed with more detail its rejection of a similar Simmons claim. State v. Starnes, Op. No. 25119, 2000 W.L. 576191 (S.C. filed May 8th, 2000). Starnes concluded that "the rationale for Simmons simply does not exist when there is a potential mandatory minimum thirty year sentence", because unlike a sentence of LWOP, "a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society". Starnes, Op. No. 25119, 2000 W.L. 576191, *9.

Finally, Starnes rejected the claim that the jury, after just convicting the defendant of two murders, therefore necessarily was going to find the aggravating factor that "two or more persons were murdered by the defendant by one act or pursuant to one scheme or

course of conduct". The court found it "inappropriate to assume the jury would find an aggravating circumstance" beyond a reasonable doubt, and thus concluded that "a potential mandatory minimum thirty year sentence existed" precluding the need for a parole ineligibility charge. Id. at *9.

B. Unlike the South Carolina's old sentencing scheme addressed in Simmons v. South Carolina, which provided for parole eligibility for murderers sentenced to life, the sentencing scheme under which Petitioner was tried provided for three options: death, life without parole, and a mandatory minimum sentence of at least thirty years.

The statutory possibility that Petitioner could have received a 30-year mandatory minimum sentence precludes the claim that the trial judge should have charged the sentencing jury that Appellant would get life without parole ["LWOP"] if the jury did not recommend death.

Previously, Simmons issues arose in the context of the old South Carolina penalty scheme for capital murder cases. Under the old law, if the jury found no aggravating factors in the penalty phase, the defendant received life in prison with a 20-year parole eligibility. If the jury found aggravating circumstances but did not recommend the death penalty, the defendant received life with a 30-year parole eligibility. See S.C. Code Ann. § 16-3-20 (Supp. 1995).

In Simmons itself, the defendant pled guilty to a number of violent crimes prior to his death penalty trial. Therefore, regardless of whether the jury found aggravating circumstances, Simmons was ineligible for parole under South Carolina's section 24-21-640, because that section precludes parole for those with a second conviction for a violent crime. See 512 U.S. at 156. The trial court prevented Simmons from mentioning parole

during *voir dire*, and denied the defense's request for a LWOP charge. 512 U.S. 159-61. During closing, the solicitor argued future dangerousness as a justification for imposition of the death penalty on Simmons. 512 U.S. at 157, 176. After the jury inquired of the judge whether a life sentence carried the possibility of parole, the judge gave a charge that (1) death and life imprisonment should be considered in their plain and ordinary meaning, and (2) parole eligibility was not for the jury's consideration. The jury then returned a death sentence. 512 U.S. at 160.

Both the plurality and concurring opinions in Simmons first recognized that states still retain discretion in determining whether parole eligibility is an appropriate consideration for the sentencing jury. 512 U.S. at 168, 176 (both opinions citing California v. Ramos, 463 U.S. 992 (1983)). However, Simmons held that due process prevented the state from creating "a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512 U.S. at 171. Simmons has thus been read to establish a two-part test for triggering of its mandate:

(1) the state must the defendant's future dangerousness at issue in the trial, and

(2) *"the only available alternative sentence to the death penalty is [LWOP]."*

See Simmons, 512 U.S. at 169 (plurality opinion); 512 U.S. at 177 (concurring opinion).

The present penalty scheme for capital murder is different from the one at issue when Simmons was decided. Under the present South Carolina Code section 16-2-30, if the jury in a capital case fails to find any aggravating circumstances, the trial court has discretion to sentence the defendant to either a mandatory minimum term of 30 years, or LWOP. Pursuant to sections 24-13-100 and -125, no part of the finite term sentence can

be reduced by parole. If the murder defendant had at least one prior conviction of a "most serious offense," then the defendant **must** be sentenced to life without parole. S.C. Code Ann. § 17-25-45 (Supp. 1997). If the defendant has at least two prior convictions of a "serious offense," then solicitors in their discretion could seek a LWOP sentence. S.C. Code Ann. § 17-25-45 (Supp. 1997).[1]

If, on the other hand, the jury finds aggravating circumstances but does not recommend a death sentence, then the trial court must sentence the defendant to LWOP. Of course, the jury can recommend a death sentence only if it finds aggravating factors. S.C. Code Ann. § 16-3-20 (Supp. 1997).

C. This Court's recent decision in Ramdass v. Angelone.

Brief review of this Court's decision in Ramdass v. Angelone is necessary to address the issues raised by Petitioner. In Ramdass, this Court reviewed in federal habeas corpus a capital murder defendant's claim that he was entitled to a parole ineligibility charge because of his ineligibility under the state's "three-strikes" law. At the time of his capital sentencing proceeding, Ramdass had been convicted of a qualifying prior crime, but the judge had not entered a final judgment of conviction as required by state law. During the capital sentencing proceeding, the jurors inquired about the availability of parole, but the trial court told them they "are not to concern [them]selves with what may happen afterwards". 120 S.Ct. 2113, 2117-20 (2000).

The Ramdass plurality made a number of points in rejecting the claim for a

[1] A murder defendant sentenced to LWOP under section 17-25-45 could still get a pardon for geriatric, health, or other extraordinary reasons. S.C. Code Ann. § 17-25-45(E) (Supp. 1997).

Simmons parole ineligibility charge:

> (1) "States have some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case, subject to the rule of Simmons." Ramdass, 120 S.Ct. at 2119, 2121.
>
> (2) Simmons has not been "extended to cases where parole ineligibility has not been established as a matter of state law *at the time of the jury's future dangerousness deliberations in a capital case*." Ramdass, 120 S.Ct. at 2119 (emphasis added).
>
> (3) A Simmons instruction is not required unless it is legally accurate, and in Simmons, the defendant had "conclusively established" his parole eligibility *at the time of sentencing*. Ramdass, 120 S.Ct. at 2120 (emphasis added).
>
> (4) A "functional approach", under which the court would attempt to "evaluate the probability of future events", is "neither necessary nor workable" under Simmons. Ramdass, 120 S.Ct. at 2121.
>
> (5) A parole ineligibility charge is of "uncertain materiality", and can be overcome if a jury concludes the defendant may escape, be pardoned, benefit from a change in state laws, or be dangerous to society in prison. Thus, the Virginia state courts had "good reason not to extend Simmons beyond the circumstances of that case". Ramdass, 120 S.Ct. at 2122.

The plurality rejected Ramdass's claim because his parole ineligibility was not conclusively established under state law. It refused to engage in a "functional approach" and predict that Ramdass would inevitably become parole ineligible, and found that entry of judgment was not a mere ministerial act, in part because of the availability of post-trial motions. 120 S.Ct. at 2119-26.

Justice O'Connor concurred with the Ramdass plurality. After noting the more restrictive federal habeas corpus scope of review, she concluded: (1) the Court looks to state law to determine parole eligibility, (2) while the defendant in Simmons "conclusively established" his parole ineligibility, Ramdass had not, (3) the entry of judgment requirement under state law was not ministerial, or inevitable foreordained under state law, and (4)

Simmons does not require state courts to estimate the likelihood of future contingencies. Thus, Justice O'Connor reasoned that LWOP was not the "only available alternative" to death, and Simmons was inapplicable. Ramdass, 120 S.Ct. at 2126-28.

D. Since no other statutory provision required that Petitioner be sentenced to life without parole if not sentenced to death, then Petitioner could have received as little as a definite term sentence of thirty years; thus, life without parole was not the only available alternative sentence, and Simmons was inapplicable.

Since there was legally available to Petitioner a potential alternative sentence to death other than LWOP, that prong of Simmons is not met. The LWOP provisions in section 17-25-45 were not triggered in this case. **{R. 1940 ll. 21-25; 1949 ll. 15-21}**. Thus, depending on the findings of the jury on the sentencing phase, Appellant faced three possible sentencing alternatives: 30 years, LWOP, or death.

South Carolina and other jurisdictions in interpreting Simmons have held that it does not apply, even if the solicitor argues future dangerousness, *unless the only other alternative to a death sentence is life without the possibility of parole*. See, e.g. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997); State v. Williams, 321 S.C. 327, 337, 468 S.E.2d 626, 632 (1996). See also State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996), cert. denied, 520 U.S. 1277 (1997). These cases were decided under the old South Carolina scheme, where a life sentence had various terms before parole eligibility unless the defendant had a LWOP-qualifying prior record. See also People v. Simpson, 665 N.E.2d 1228 (Ill. 1996); State v. Chapman, 464 S.E.2d 661 (N.C. 1995); Smith v. State, 898 S.W.2d 838 (Tex. Crim. App. 1995). While this case involves different circumstances, the fact remains that Appellant had a sentencing alternative other than death or LWOP.

Petitioner asserts that the South Carolina Supreme Court took the "only available alternative to death" language out of context in Justice O'Connor's concurring opinion and mistook it for the holding of Simmons. Petition for Certiorari p. 16. Petitioner is incorrect. Both the plurality in Simmons and Ramdass used or recognized the "alternative sentence" language. Simmons, 512 U.S. at 169 (plurality uses "alternative sentence to death is [LWOP]" language in its statement of the holding); 512 U.S. at 177 (concurring opinion uses "only available alternative sentence to death" language). See also Ramdass, 120 S.Ct. at 2120 (plurality cites with approval Justice O'Connor's "only available alternative sentence" language); 120 S.Ct. at 2126 (Justice O'Connor reiterates her "only available alternative sentence" language in the concurring opinion). Indeed, even the Ramdass dissent used Justice O'Connor's "only available alternative sentence" language in its statement of the Simmons rule, 120 S.Ct. at 2135, and Justice O'Connor stated:

> In Simmons v. South Carolina . . ., *a majority of the Court held* that "where the State puts the defendant's future dangerousness at issue, and the only available alternative sentence to death is life imprisonment without the possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible".

Ramdass, 120 S.Ct. at 2126 (emphasis).[2] See also Keel v. French, 162 F.2d 263 (4th Cir.

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[2] It is Petitioner, however, that takes statements in Ramdass out of context when he quotes the plurality's explanation of the holding of Simmons. See Brief of Petitioner p. 18 (stating: "Later, Justice Kennedy elaborated on this point, observing that under Simmons, a "parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law."). Justice Kennedy was merely describing Simmons's applicability to a scheme where a life sentence carried the possibility of parole unless the defendant's prior record precluded parole. A similar scheme existed under Virginia law in Ramdass. Justice Kennedy was not addressing a scheme like the one present in this case, where a mandatory minimum definite term sentence was a third option to LWOP and death. As such, Justice Kennedy's statements cannot be read in isolation to preclude the state's argument here.

1998) (recognizing Justice O'Connor's concurring opinion in Simmons as a statement of the case's holding).

Of course, resolution of a Simmons claim in this case depends on making an analogy between a life sentence with the possibility of parole under the old South Carolina scheme (which was present in Simmons), and a definite mandatory minimum sentence under the new penalty scheme (which is present in this case).[3] Such an analogy is appropriate. The concern in Simmons was that the solicitor had created a "false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512 U.S. at 171. As held in United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), it does not matter whether the "false dilemma" is avoided by the presence of a life sentence with parole, or whether it is avoided because the defendant could potentially receive a sentence of a definite term. The fact remains that another legally available option existed besides death and LWOP. The mechanism by which Petitioner could be released, either parole or expiration of a definite term, is irrelevant because release is inherent in either type of sentence, and the "false dilemma" of a future dangerousness argument only exists where the defendant will never be released. See Ramdass v. Angelone, 120 S.Ct. 2113, 2135 (2000) ("If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . *will never be part of society again*." (Stevens, J., dissenting) (emphasis added); Starnes, Op. No. 25119, 2000 W.L. 576191, *9 (unlike a sentence of LWOP, "a mandatory

[3] Cf. Flores, 63 F.3d at 1366-68 (discussing a Simmons claim in the context of whether a definite term sentence existed as an alternative to LWOP).

minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society").[4]

Other cases have ruled Simmons inapplicable under penalty schemes and situations similar to this one. In United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), co-defendant Juan Garza faced a capital trial in federal court for a number of murders related to drug trafficking. The evidence against Garza showed that he either contracted for or participated in the murders of three men. 63 F.3d at 1351-52. Garza requested the jury be instructed that LWOP was the only alternative sentence, but the trial court instead told the jury that, if the jury did not recommend death, the court could impose either LWOP or another sentence. 63 F.3d at 1367. Under 21 U.S.C. § 848(e), the court could sentence the defendant to "any term of imprisonment" from 20 years to LWOP, assuming the jury did not recommend death. In addition to some mitigators, Garza's jury found first-tier aggravators, second-tier aggravators, and non-statutory aggravators, including that Garza premeditated and planned the killings, that he participated in a contract killing, and that he was also responsible for five more killings. Flores, 63 F.3d at 1366-67.

In challenging his death sentence, Garza argued that if the jury did not return a death sentence, the trial court would have had no choice but to impose LWOP. According to Garza, a comment in the Federal Sentencing Guidelines necessarily and expressly prevented the trial court from imposing a lower sentence than LWOP, because the jury

[4] Similarly, this Court in Simmons noted that the "false dilemma" was not created when the prosecution was merely arguing that the defendant was be dangerous in the future to other inmates and prison staff, because obviously whether the defendant will get out of prison is irrelevant to such a future dangerousness argument. See Simmons, 512 U.S. at 165 n.5 (plurality opinion); 512 U.S. at 177(O'Connor, J., concurring).

found as an aggravator that he intentionally killed his victims. Garza also argued that certain enumerated factors authorizing lower sentences in the Federal Sentencing Guidelines, were not present in his case. Thus, Garza asserted Simmons was triggered because the trial judge would have to give a LWOP sentence if the jury did not recommend death. Flores, 63 F.3d at 1367-68.

In rejecting this argument, the Flores decision stated:

> However, assuming without deciding that the jury's findings of intentional killing would be binding on the sentencing judge and therefore prevent a downward departure, **the court could not predict before the jury begins its** [sentencing phase] **deliberation** whether it is going to find the necessary intent. Thus, when the attorneys make their final arguments in the penalty phase and **when the court gives its penalty instructions, no one would know whether life imprisonment would be the only permissible sentence**.

63 F.3d at 1368 (emphasis added). Moreover, the court also concluded that the general discretionary mitigator in the Sentencing Guidelines at least remotely left open the possibility of a lesser sentence. Thus, Flores rejected the Simmons claim because LWOP was not the only alternative sentence legally available. Flores, 63 F.3d at 1368.[5]

Like Garza, Petitioner also had a sentencing alternative other than death. At the time the attorneys gave their penalty phase arguments and the judge gave his penalty phase charge, no one could have conclusively predicted whether the jury would find a

[5] In People v. Simpson, 665 N.E.2d 1228 (Ill. 1996), the court also rejected a similar argument. The defendant on appeal claimed the trial judge erred by only instructing the jury that the court would impose some other sentence on the defendant if the jury did not return a death sentence. The Simpson court noted that an LWOP instruction would be required in a multiple murder situation where under statutory law LWOP would be the only alternative sentence. Thus, the court held Simmons inapplicable because the defendant, who only killed one person, was statutorily eligible for a sentence other than LWOP. 665 N.E.2d at 1244-45.

necessary aggravator. Therefore, it was impossible to know whether LWOP would be the only possible alternative sentence until after the jury's penalty phase verdict. If the jury had not found an aggravator, then Appellant could have received a sentence as low as 30 years. Accordingly, he had a *legally available sentence* besides death and LWOP, and thus Simmons is inapplicable.

This Court similarly rejected a "functional" approach to Simmons in Ramdass. Both the plurality and concurring opinions found it neither "necessary [n]or workable" for trial courts to "evaluate the probability of future events" in order to determine Simmons's applicability. Ramdass, 120 S.Ct. at 2121, 2127-28. Similarly, in this case a trial court would have to evaluate the future likelihood that the jury would find an aggravator beyond a reasonable doubt. Unlike the Ramdass plurality, concurrence, and dissent's disagreement over the effect of entry of judgment under Virginia law, a jury's duty to make factual findings beyond a reasonable doubt can hardly be termed to be "ministerial" or "inevitable and foreordained". Ramdass, 120 S.Ct. at 2123, 2127. As such, Simmons is inapplicable.

Appellant dismisses the argument that another sentence was available by noting the jury only decides between life and death, and the jury makes no sentencing recommendation if it fails to find an aggravator. It is generally true that the sentencing jury makes an either/or selection. Cf. State v. Norris, 285 S.C. 86, 95, 328 S.E.2d 339, 344 (1985). Again, it does not matter whether the Simmons "false dilemma" is avoided by the presence of a life sentence with parole, or whether it is avoided because the defendant could potentially receive a sentence of a definite term.

Further, the test for other available alternative sentences to death other than LWOP

is *at the time of sentencing*. Ramdass, 120 S.Ct. at 2119 (Simmons has not been "extended to cases where parole ineligibility has not been established as a matter of state law *at the time of the jury's future dangerousness deliberations in a capital case*.") (plurality opinion, emphasis added). It cannot be challenged that at the time of Petitioner's sentencing, a lesser definite term sentence was legally available to Petitioner under South Carolina state law.

Indeed, Appellant seeks to create within the jurors a sort of reverse-Simmons "false sense of security," that if they fail to return a death sentence, LWOP will be imposed. This is inaccurate, unfair to the state, and not constitutionally required.[6] See Ramdass v. Angelone, 120 S.Ct. 2113, 2120 (2000) ("In this case, a Simmons instruction would not have been accurate under the law."); Simmons 512 U.S. at 161-62 ("grievous misperception [about LWOP] was encouraged by the trial court's refusal to provide *accurate information* regarding petitioner's parole eligibility) (emphasis added); Gregg v. Georgia, 428 U.S. 153, 190 (1976) (*Eighth* Amendment requires provision of "accurate" sentencing information); State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *6 (S.C. filed May 8th, 2000) ("Informing the jury that appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.").

Moreover, even though the jury only chooses between LWOP or death if it finds an aggravator, the jury's findings still ultimately drive which one of the three sentencing options is available to the defendant, as only if the jury fails to return an aggravator does

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[6] Further, defense counsel conceded at trial that "juries from May 30th, 1996 have three options in the state of South Carolina." **{R. 1949 ll. 15-21}**.

the mandatory minimum thirty year sentence become a possibility. In South Carolina, when the murder defendant seeks a jury trial, the jurors decide whether aggravating factors are present. State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989) ("In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight."), cert. denied, 494 U.S. 1060 (1990); State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986) ("The trial judge must submit to the jury those aggravating circumstances are supported by the evidence."), cert. denied, 480 U.S. 940 (1987).[7] Petitioner asked for and got his jury trial; it is speculative and would make the jury's role in determining aggravating factors irrelevant to contend that at the time of the charge only death and LWOP were available. See State v. Starnes, Op. No. 25119, 2000 W.L. 576191 (S.C. filed May 8th, 2000) ("inappropriate" to assume jury will necessarily find existence of an aggravator beyond a reasonable doubt). Moreover, Simmons is not triggered when the defendant's entitlement to a third sentencing alternative depends on resolution of a matter of fact.[8]

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[7] See also S.C. Code Ann. § 16-3-20(B) (Supp. 1997) ("The [sentencing] proceeding must be conducted by the trial judge before the trial jury . . . . If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge.").

[8] In Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 489 U.S. 1040 (1989) the court rejected a Simmons claim from a defendant who was technically eligible for parole. The defendant claimed error in (1) the failure of the trial court to admit expert testimony that a Texas parole board "almost certainly" would consider the defendant ineligible for parole, and (2) the judge's failure to so charge the jury. Scott noted that Simmons requires that the defendant's parole ineligibility turn on a matter of law, NOT a matter of fact. Thus, the court concluded:

> A capital defendant's parole ineligibility must be a matter of law because evidence of such ineligibility is inherently "truthful" . . . . **But if a defendant's parole ineligibility is a matter of fact, i.e. the defendant probably will not**

Admittedly, Petitioner's counsel did argue to the jury that "you're going to find a statutory aggravator." **{R. 1915 ll. 9-14}**. However, Appellant did NOT concede the aggravator as a matter of law. Instead, the jury was instructed of its duty to find an aggravator beyond a reasonable doubt and that it should stop further deliberation if it failed to so find. **{R. 1920 ll. 8-10; 1923 ll. 13-16; 1927 ll. 18-21; 1928 l. 23 - 1929 l. 5}**. Thus, like Flores, at the time the judge charged the jury, the definite term sentence was still a possibility, and LWOP was not the only legally available alternative sentence to death. Cf. also State v. Mitts, 690 N.E.2d 522, 528-29 (Ohio 1998) (rejecting Simmons argument that trial judge erred in failing to answer jury's question whether two life sentences would be served consecutively, and noting, "[defense] counsel's argument that it was unrealistic to think that the trial judge would impose concurrent sentences here is speculative."). As such, and like Ramdass, Petitioner has not "conclusively established" that LWOP was the only available alternative sentence to death at the time of sentencing. Ramdass, 120 S.Ct. at 2120. Simmons is not triggered.

Of course, the practical effect of such a rule is that solicitors may argue future dangerousness without the necessity of an LWOP charge, unless the LWOP-qualifying "serious offenses" or "most serious offenses" trigger South Carolina Code section 17-25-45. Petitioner contends that the South Carolina Supreme Court has ruled Simmons

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> **be eligible for parole, then the evidence is purely speculative** (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness.

Scott, 41 F.3d at 21-22 (emphasis added). Just like Scott, whether Petitioner was eligible for a mandatory minimum 30-year sentence depended on his jury's resolution of a matter of fact.

inapplicable to its sentencing scheme. However, the state court's result is no different than what existed under the old South Carolina scheme, as even under the statutory scheme in Simmons itself solicitors could argue future dangerousness without an LWOP charge, unless the defendant had a prior "violent crime" making him ineligible for parole under South Carolina Code section 24-21-640. In this case, Simmons is inapplicable unless the defendant's prior record qualifies him for LWOP under section 17-25-45. In both the Simmons situation and the present situation, it is the defendant's prior record that controls the applicability of Simmons, and there is no material difference between the situations.

In its brief to the South Carolina Supreme Court in this case, the state raised a number of practical problems if the court extended Simmons to Petitioner's case. Brief of Respondent pp. 36-38. Similarly, the plurality in Ramdass noted that a parole ineligibility charge is of "uncertain materiality", and can be overcome if a jury concludes the defendant may escape, be pardoned, benefit from a change in state laws, or be dangerous to society in prison. It noted that the possibility of peripheral litigation on LWOP issues could legitimately lead a state to conclude the jury may be distracted. Thus, the Ramdass plurality concluded that Virginia state courts had "good reason not to extend Simmons beyond the circumstances of that case", Ramdass, 120 S.Ct. at 2121-22, and stated that "States have some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case, subject to the rule of Simrnons." Ramdass, 120 S.Ct. at 2119, 2121.

The South Carolina Supreme Court ruled that "neither parole eligibility nor parole ineligibility are proper considerations for the jury". State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *7 (S.C. filed May 8th, 2000). Because evidence of parole ineligibility is of

"uncertain materiality", and because of the potential of practical problems and collateral litigation in charging a jury under the new sentencing scheme, South Carolina similarly had good reason not to extend Simmons beyond the circumstances of that case.

E. The prosecution did not argue future dangerousness; thus, the rule in Simmons was not triggered.

As noted before, the Simmons test requires that both prongs be present for its rule to attach. Thus, if the solicitor did not argue future dangerousness, a Simmons charge is not necessary. The trial judge repeatedly found that future dangerousness was not an issue in this case. **{R. 1820 l. 24 - 1821 l. 6; 1893 l. 23 - 1894 l. 10; 1896 ll. 18-22}**.

As an initial matter, Petitioner seems to challenge the premise that future dangerousness argument by the prosecution, or at least some express reliance on future dangerousness by the prosecution, is necessary to satisfy first prong of the Simmons test. Such a view is as odds with this Court's expression of the Simmons rule. See Ramdass, 120 S.Ct. at 2117 (plurality opinion) (state submitted to the jury a future dangerousness aggravating circumstance); 120 S.Ct. at 2126 (concurring opinion) (noting that the state must seek "to demonstrate that the defendant poses a future danger to society"); 120 S.Ct. at 2135 (dissenting opinion) (stating: "If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . will never be part of society again."). See also Simmons, 512 U.S. at 162 ("grievous misperception" encouraged by "state's repeated suggestion that petitioner would pose a future danger to society); 512 U.S. at 163 (prosecutors in South Carolina often emphasize a defendant's future dangerousness in their evidence and argument, and they urge the jury to sentence the defendant to death so he will not be a danger to the public if released); 512

U.S. at 168-69 ("If the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future . . .").

If Petitioner is correct that the state raises future dangerousness by merely introducing evidence in the sentencing phase about a murder defendant's past criminal conduct and bad acts, then the first prong of Simmons would be superfluous and Simmons would apply to every capital case where the only alternative sentence to death was LWOP. Justice O'Connor flatly rejected such a view in Simmons:

> Likewise, if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death" is LWOP.

512 U.S. at 175 (O'Connor, J., concurring). Similarly, the Simmons plurality also implied that character, prior criminal history, and background are not the same thing as future dangerousness. 512 U.S. at 164 ("The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, *in addition to future dangerousness*, that a jury may consider in fixing punishment." (Emphasis added)). See also State v. Southerland, 316 S.C. 377, 387, 447 S.E.2d 862, 868 (1994) (rejecting a Simmons claim by noting that the "solicitor specifically agreed not to argue [the defendant's] future dangerousness"), cert. denied, 513 U.S. 1166 (1995), and overruled on other grounds by State v. Chapman, 317 S.C. 302, 524 S.E.2d 833 (1999); State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1994) (evidence of prior record and character relevant in the sentencing phase without regard to future dangerousness, where no contention that defendant should be sentenced to death because of future dangerousness); State v. Williams, 468 S.E.2d 626, 321 S.C. 327 (1996). Along with South Carolina, Pennsylvania has also noted the distinction that evidence of prior criminal conduct does not necessarily

raise future dangerousness. See, e.g. Commonwealth v. May, 710 A.2d 44, 47 (1998), cert. denied, 525 U.S. 1078 (1999).

Further, both the Simmons plurality and Justice O'Connor in concurrence recognized that the state could legitimately argue that the defendant would be a future danger to other inmates and prison staff, without triggering the rule in Simmons. 512 U.S. at 165 n. 5; 512 U.S. at 177. Clearly, it is the use to which the prosecution puts the evidence which triggers the rule in Simmons.

In this case, unlike Ramdass, future dangerousness was not submitted to the jury as a statutory aggravator. Unlike Simmons, the prosecution did call any mental health experts to testify that Petitioner would likely be dangerous in the future. Despite this, Petitioner points to a number of factors from which he asserts the state raised the issue of future dangerousness.

First, Petitioner argues that the boilerplate language in the state's Notice of Evidence in Aggravation of the Punishment raises future dangerousness. Even if true, it is irrelevant; no "false dilemma" in violation of Simmons can arise from assertions in a document which is never before the jury. Cf. Simmons, 512 U.S. at 171.

Next, Petitioner argues that the evidence that he had been involved in an incident where some guys engaged in sex with two 12-year-old girls, as well as evidence that Petitioner got into an altercation with a jail employee, raised the issue of future dangerousness. In this case, the state did introduce evidence about Petitioner's past conduct and prior criminal record. While the solicitor generically referred once to the jury's right to consider Petitioner's character **{R. 1885 ll. 6-7}**, he ***never once*** referred to any of

Petitioner's past conduct or criminal record during his argument. As noted before, the state was entitled to produce evidence of Petitioner's past criminal conduct and bad acts without triggering Simmons, where it never expressly raised to the jury that Petitioner should be sentenced to death because he might be a danger in the future.

Petitioner contends the solicitor did in fact argue future dangerousness when he stated:

> Ladies and Gentlemen, one of the scariest things, certainly the crime, certainly the video, but one of the scariest things I think about that second video, the video where we saw the cash tape, the horror and all of the sound, do you remember the girls that came in and when Jamie Palmer was saying "Oh, God; Oh, God; Ray, Ray" and the girls were running in and out, we've got to go, we've got to go, and I tell you what, I've listened to it, you've listened to it, and you will have a chance again, but what is really etched in my mind is Monica Inman. Remember Jamie picks up that phone and she's calling 911, and Monica Inman says "Come on, Jamie, they might come back, they might come back".
>
> Ladies and Gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the State. So that the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, and they might come back, they might come back, they will remember this day, and they will remember this jury, and they will remember this verdict.

{R. 1891 l. 7 - 1892 l. 1}. Petitioner contends the reference to "they might come back" raises future dangerousness. The first time the solicitor referred to the phrase, he was describing the evidence. The second time is clearly part of a general deterrence argument, not a future dangerousness argument. The "they" in the second paragraph obviously refers to "the next time somebody thinks about loading up" and coming to Union County, not Petitioner specifically.

It is elementary that a future dangerousness argument is a specific deterrence

argument. See, e.g. Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986) (future dangerousness is relevant to specific deterrence); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (future dangerousness is relevant to specific deterrence); State v. Rose, 451 S.E.2d 211 (N.C. 1994) (future dangerousness is a specific deterrence argument). There is a distinction between specific deterrence and general deterrence arguments. State v. Simmons, 310 S.C. 439, 445, 427 S.E.2d 175, 179 (1993), rev'd on other grounds, 512 U.S. 154 (1994). Thus, a general deterrence argument does not raise future dangerousness.

Moreover, the arguments Appellant points to in Simmons which were held to raise future dangerousness also only sought specific deterrence against the particular defendant. In Simmons, the prosecutor told the jury its role was to decide "what to do with [petitioner] now that he is in our midst". The prosecutor also stated: "Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." 512 U.S. at 176. The "someone" in Simmons was that particular defendant, not some hypothetical future defendant as argued in this case.

The state was entitled to introduce Appellant's past conduct and prior record without raising future dangerousness. Since the solicitor only argued general deterrence, and never in fact referred to any of Appellant's prior record, the state never put future dangerousness into issue. Accordingly, Simmons is not triggered, and certiorari should be denied.

II. The exclusion of evidence on the deterrent effect of the death penalty does not violate due process where both the state and the defense have equal opportunity to argue their respective views on the issue.

A. How the federal question was raised and decided below

1. Events at trial

At trial, the solicitor made the following argument during the sentencing phase:

> Ladies and Gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the State. So that the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, and they might come back, they might come back, they will remember this day, and they will remember this jury, and they will remember this verdict.

{R. 1891 l. 19 - 1892 l. 1}. After reminding the jury that the frightened witness who found the victim stayed with him until help arrived, the prosecutor asked for similar courage from the jury. The prosecutor then concluded:

> Let everyone know this day in Union County justice was done in this case that will send a message of how Union County handles a crime of this nature.

{R. 1892 l. 2 - 1893 l. 6}.

Prior to defense closing argument, the defense moved to reopen the record to present "issues of statistics and witnesses" as to the death penalty's deterrent value. The defense concluded that the solicitor had brought deterrence into issue, and it asked "for time to present evidence to rebut that". In the alternative, the defense requested an instruction that the jury was to disregard the solicitor's references to "danger to the community". **{R. 1894 ll. 11-23}**.

After the solicitor pointed out South Carolina case law that allowed general

deterrence argument without the need for such evidence, the trial court ruled that "you can't introduce [general deterrence] evidence, but you can argue it." **{R. 1895 ll. 18-21}**.

2. Appeal

The South Carolina Supreme Court rejected this issue as follows:

> In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.
>
> In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996). Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.
>
> * * *
>
> Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

State v. Shafer, Op. No. 25120, 2000 W.L. 576189 (S.C. filed May 8th, 2000).

B. Since Petitioner had as much an opportunity in argument to "deny or explain" the general deterrent effect of the death penalty as the state did to assert it, there was no violation of due process.

According to Petitioner, he is only raising the "narrow" claim that due process requires evidence about the death penalty's deterrent effect if the prosecutor argues general deterrence. He relies on the general due process rule that a defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny

or explain". Gardner v. Florida, 430 U.S. 349, 362 (1977). However, the even playing field at Petitioner's trial precludes a successful due process claim.

South Carolina law is clear that either side may argue general deterrence, but no side may introduce evidence on the issue. For example, State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), a unanimous court affirmed the trial judge's rejection of a defense witness called to testify about the deterrent effect of the death penalty. George reasoned that since the propriety of capital punishment was for the legislature, and constitutionality was for the courts, evidence regarding the deterrent effect of the death penalty was irrelevant. More importantly, the court also stated:

> However, counsel for both sides may argue their respective opinions concerning the deterrent effect of capital punishment, but cannot introduce specific data to corroborate their views.

George, 323 S.C. at 514, 476 S.E.2d at 914. See also State v. Shafer, Op. No. 25120, 2000 W.L. 576189 (S.C. filed May 8th, 2000).

Petitioner cites to cases from other jurisdictions which have taken a different tack on the issue, and barred general deterrence argument. However, there are also a number of cases that have arrived at results analogous to South Carolina's rule. In Fleming v. State, 458 S.E.2d 638 (Ga. 1995), the court cited a plethora of cases supporting the propriety of closing argument on general deterrence. Id. (citing Gregg v. Georgia, 428 U.S. 153 (1976)). Reasoning that both the prosecution and defense were equally precluded from deterrence evidence but allowed deterrence argument, the court also rejected the claim that the exclusion of expert testimony of the non-deterrent effect of the death penalty meant that the defendant was sentenced on the basis of information he had "no opportunity to deny or explain". Fleming, 458 S.E.2d at 640.

The Eleventh Circuit also held that general deterrence was an appropriate consideration for a sentencing jury. See Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), modified on other grounds, 781 F.2d 185 (11th Cir. 1986), cert. denied, 479 U.S. 909 (1986). Martin further reasoned that the Constitution allows general deterrence argument even if general deterrence evidence is excluded. 770 F.2d at 937.

The Eleventh Circuit earlier addressed these issues in Collins v. Francis, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963 (1984). Collins found support from two decisions of this Court for the premise that general deterrence was a permissible sentencing consideration. Collins, 728 F.2d at 1339-40 (discussing Williams v. New York, 337 U.S. 241 (1949) (approving general deterrence as one factor appropriately considered by a judge in imposing sentence), and United States v. Grayson, 438 U.S. 41 (1978) (indicating no "qualms" about a district judge's general deterrence comments in sentencing)). Collins also rejected the notion that the prosecution had to "prove" with empirical evidence the deterrent effect of the death penalty before it could make general deterrence argument, because: (1) criminal sanctions have "historically" been justified in part on theories of general deterrence, and (2) empirical evidence would be "difficult, if not impossible" to produce with any "significant particularity" to guide the sentencing body. 728 F.2d at 1340.

Thus, Petitioner is incorrect that general deterrence in an inappropriate consideration for sentencing a particular defendant to death. See also Skipper v. South Carolina, 476 U.S. 1, 12 (1986) (Powell, J., concurring) ("We have recognized that society has important and legitimate interests in retribution and deterrence, and that these interests provide the necessary justification for the death penalty."). Indeed, members of

this Court have noted that the death penalty is "undoubtedly" a deterrent for some murderers. Gregg v. Georgia, 428 U.S. 153, 185 (1976).

Since general deterrence argument is proper, the question thus becomes whether exclusion of evidence on general deterrence violates the due process rule in Gardner v. Florida. In this case, the trial court's ruling was evenly applicable to both sides. And like the state, Appellant did in fact make his own general deterrence argument. Defense counsel argued:

> The solicitor asked you to deliberate. I ask you, what do you teach your little children? You teach them . . . love and affection. Do you teach them as Wesley Schafer was taught, having you clothes set on fire, being beat, being thrown out of the house?
>
> Martin Luther King . . . told all of his followers not to respond in violence when you face violence, that will not solve the problem. And it won't solve the problems in our context here.

{R. 1906 l. 16 - 1907 l. 1}. Counsel continued:

> You know, what do we teach our children if we resort to violence, if we have the state of South Carolina, citizens of Union County execute Wesley Shafer? Will that violence teach us anything? Will it teach the children anything that's right?

{R. 1908 ll. 4-8}. Deterrence argument in Appellant's trial was made on a fair and level playing field which provides no basis for challenging the sentencing result.

Similarly, Appellant misses the mark with his assertion that the lack of general deterrence evidence violates "the due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain." Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986) (citing Garner v. Florida, 430 U.S. 349 (1977)). Of course, Skipper and Garner dealt with evidence, not argument, and

as the trial judge charged the jury in this case, argument is not evidence. **{R. 902 l.15 - 903 l. 25; 1356 ll. 11-18; 1437 ll. 11-16}**. Since both sides not only had even opportunity but in fact did argue general deterrence, Appellant had as much an opportunity to "deny or explain" general deterrence as the state did to assert it. For this reason coupled with the judge's charges, any error was harmless. Cf. generally Skipper, 476 U.S. at 8.

Petitioner challenges this rationale by arguing that the elected solicitor's opinion on general deterrence unfairly carries more weight with the jury than the argument of defense counsel. Of course, such an issue could be raised with regard to **any** aspect of closing argument, such as conflicting arguments as to the inferences to be drawn from circumstantial evidence. Moreover, there are undoubtedly many capital defense attorneys who are far more in the public eye than their public servant counterparts, and it is speculative to assume that Petitioner's jury naturally accorded more weight to the solicitor's argument.

Further, it is not inconsistent to allow argument but deny evidence on general deterrence. Prosecution arguments about general deterrence such as the one in this case are usually part of an argument urging fearless administration of justice. On the other hand, defense arguments on general deterrence, such as the one in this case that violence doesn't solve violence, are usually are part of an argument for mercy. Both of these types of argument, which merely seek to impress upon the jury its responsibility in sentencing, are a far cry from the jury actually listening to battles of experts and statistics and essentially making factual findings about whether the death penalty is a deterrent. The state can legitimately conclude to avoid such collateral litigation in a sentencing

proceeding.[9] See, e.g. Ramdass, 120 S.Ct. 2121-22.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Assistant Attorney General

ATTORNEYS FOR RESPONDENT

By: _____

August 21st, 2000

[9] Appellant cites statistics in his brief which were not proffered at trial, and are not properly considered. See Ramdass, 120 S.Ct. at 2123-24. In any event, similar statistics and argument support the existence of a deterrent effect. See John C. McAdams, "Wisconsin Should Adopt Death Penalty," 79 Marq. L. Rev. 707, 710-13 & nn. 10-23 (1996). Prison guards have testified that inmates given life without parole become very dangerous because they know nothing further can be done to them without a death penalty. See United States v. Battle, 979 F. Supp. 1442, 1464-66 (N.D. Ga. 1997).

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that Respondent's ***Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of South Carolina*** in the foregoing action has been served on opposing counsel by depositing two (2) copies in the United States mail postage prepaid to the following:

David I. Bruck
P.O. Box 11744
Columbia, SC 29211

This 21st day of August, 2000.

DONALD J. ZELENKA

Appendix

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Wesley Aaron Shafer, Jr., Appellant.

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25120
Heard October 7, 1999- Filed May 8, 2000

AFFIRMED

David I. Bruck, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Ray Broome while attempting to rob the convenience store where Broome was

working. Appellant maintained the killing was without malice.[1] A jury convicted appellant of murder, attempted armed robbery, and conspiracy. He was sentenced to death for murder and consecutive terms of twenty years' imprisonment and five years' imprisonment, respectively, for attempted armed robbery and conspiracy.[2] Appellant appeals.

FACTS

Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.

At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.

Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned outside.

Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the

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[1]During the penalty phase of trial, appellant's expert witness testified appellant shot Broome in response to a lifetime of abuse and violence.

[2]The jury found the statutory aggravating circumstance of murder while in the commission of an attempted armed robbery while armed with a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) Supp. 1998.

register counter, and shot Broome a second time.[3] Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.

Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store, found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head.[4] Broome died at the hospital.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him, and I'm the one that had the gun, and I guess I just snapped."

ISSUES[5]

I. Did the trial court err by refusing to instruct the jury appellant was parole ineligible?

II. Did the trial judge err by granting the State's motion to prohibit both the prosecution and defense from referring to the Bible or using religious references during closing argument?

III. Did the trial judge err by refusing to allow appellant to reopen the record to present evidence on deterrence or, alternatively, for a curative instruction after the solicitor argued

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[3]Appellant waited eight seconds before firing the second shot.

[4]All the events inside the Hot Spot were recorded on the store's security camera.

[5]All issues stem from the sentencing phase of appellant's trial.

the general deterrent effect of the death penalty?

DISCUSSION

I.

Appellant argues, for various reasons, the trial court erred by refusing to instruct the jury he was parole ineligible. We disagree.

After closing arguments, relying on Simmons v. South Carolina, 512 U.S. 154 (1994), appellant requested the trial court instruct the jury he would be ineligible for parole. The trial court denied the request.

Thereafter, the trial judge instructed the jury "life imprisonment means until the death of the defendant." He later stated: "[i]n deciding whether to sentence the defendant to death or to life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death."

After three and one-half hours of deliberation, the jury returned with the following questions:

1. Is there any remote chance for someone convicted of murder to become eligible for parole?

2. Under what conditions would someone convicted for murder be eligible?

Regarding Question 1, appellant agreed the trial court should instruct the jury "life imprisonment means until the death of the offender and requested the court read the portion of § 16-3-20(A) which explains no person sentenced to life imprisonment is eligible for parole or any other form of release or credits which would reduce a life sentence. Appellant stipulated Question 2 could not be answered. After the trial judge informed the parties of his intended response to the jury's questions, appellant requested the trial

judge delete any reference to parole eligibility.[6]

The trial judge responded to the jury's questions as follows:

> Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge. Section 16-3-20 of our Code of Laws as applies to this case in the process we're in states that, 'for the purposes of this section life imprisonment means until the death of the offender.' Parole eligibility or ineligibility is not for your consideration.

Appellant excepted stating, "we would renew our objection under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the State and Federal Constitutions." The trial judge noted the exception.

A.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends Simmons mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. Id.; State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in

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[6]The trial judge stated he would charge the jury as follows: "[y]our consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16-3-20 of the South Carolina Code of Laws provides that for the purpose of this section life imprisonment means until the death of the offender. Parole eligibility is not for your consideration."

his view, would not pose a future danger to society." Simmons, 512 U.S. at 165 (1994) (plurality opinion).

Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp. 1998). Under the new sentencing scheme, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. We recently held Simmons is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. State v. Starnes, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 17).[7] Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues Simmons mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read Simmons so narrowly. By its own terms, Simmons requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to the defendant. Simmons, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole. . ."). (emphasis added). This interpretation is supported by decisions from other jurisdictions. Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999) (Simmons is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and,

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[7]In Starnes, we suggested, under the terms of the statute, it is arguable a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

therefore Simmons is inapplicable); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 514 U.S. 1108 (1995) (Simmons applies where capital defendant is ineligible for parole as a matter of law; Simmons does not apply even if it is unlikely defendant would be paroled); People v. Simpson, 665 N.E.2d 1228 (Ill.), cert. denied, 519 U.S. 982 (1996) (Simmons inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); State v. McLaughlin, 462 S.E.2d 1 (N.C. 1995), cert. denied, 516 U.S. 1133 (1996) (Simmons inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, Simmons was inapplicable.[8]

B.

Appellant contends the failure to inform the jury he was parole ineligible violated the Eighth Amendment prohibition against the arbitrary

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[8]The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting Flores, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In Flores, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in State v. Starnes, supra, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

infliction of the death penalty.[9] He specifically argues the failure to inform the jury of his parole ineligibility prevented him from presenting mitigating evidence in support of a sentence less than death and diminished the reliability of the jury's sentencing decision. In light of the new sentencing statute, he asks the Court to reconsider its policy prohibiting the trial judge from informing the jury a capital defendant is parole ineligible.

Initially, we note this issue is not properly preserved for appellate consideration. After the trial judge responded to the jury's question, appellant stated he excepted "on the basis of the Eighth Amendment." He offered no explanation or argument in support of the exception. Appellant's objection to the supplemental instruction is simply too vague for the Court to review. State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (general objection leaves nothing for Court to review). Clearly, appellant never argued, as he does now, that the Eighth Amendment requires a charge on parole ineligibility as mitigating evidence and to ensure the reliability of the sentence imposed. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge).

In any event, the Eighth Amendment requires that a death sentence not be imposed arbitrarily. Jones v. United States, 527 U.S. 373 (1999). It prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty. Payne v. Tennessee, 501 U.S. 808, 822 (1991) (citing Eddings v. Oklahoma, 455 U.S. 104, 114 (1982)). The United States Supreme Court has "deferred to the State's choice of substantive factors relevant to the penalty determination." California v. Ramos, 463 U.S. 992, 1001 (1983). Whether parole eligibility is relevant to the sentencing determination is a matter of state law. Id.; see Simmons v. South Carolina, 512 U.S. 154, 176 (O'Connor, J., concurring) ("[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the

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[9]U.S. Const. amend. VIII.

States.").[10]

In South Carolina, parole eligibility is not relevant to a jury's sentencing considerations. State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995) (defendant who was parole eligible after service of thirty years not entitled to charge on parole eligibility). The refusal to inform the jury of the capital defendant's parole eligibility does not violate the Eighth Amendment. Id.

Although we have never explicitly ruled whether the Eighth Amendment entitles a capital defendant to a charge informing the jury he is parole *in*eligible, precedent suggests no such instruction is required.[11] In State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Chandler, J., concurring), the Court held the defendant who was parole ineligible due to a prior conviction for a violent crime was not entitled to a charge informing the jury of his parole ineligibility. In State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994), cert. denied 513 U.S. 1166 (1995), overruled on other grounds State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995), we concluded there was no Eighth Amendment violation where the trial judge did not instruct the jury the defendant was parole ineligible but defense counsel argued "life imprisonment" means the defendant will never be released from prison. In Simmons v. South Carolina, 512 U.S. 154 (1994), the United States Supreme Court declined to hold the Eighth Amendment requires the jury to be informed a capital defendant is parole ineligible.

Relying on Skipper v. South Carolina, 476 U.S. 1 (1986), appellant asserts parole ineligibility is a mitigating circumstance of which the jury should have been informed. We disagree.

As noted above, the Eighth Amendment prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence."

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[10]O'Dell v. Netherland, 521 U.S. 151, 165 (1997) ("[I]n Simmons, the Court carved out an exception to the general rule described in Ramos by, for the first time ever, requiring that a defendant be allowed to inform the jury of the postsentencing legal eventualities.").

[11]Appellant agrees there has been a blanket prohibition against any instruction on parole eligibility or ineligibility.

Payne v. Tennessee, 501 U.S. 808, 822 (1991). For purposes of the Eighth Amendment, mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. 1, 4, citing Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); see State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt). In Skipper, the Supreme Court held evidence of the defendant's good behavior while in jail awaiting trial was potentially mitigating because it indicated he would not pose a danger in the future. Accordingly, excluding evidence of the defendant's future adaptability violated the Eighth Amendment.

Unlike a defendant's behavior in prison, parole ineligibility is not an aspect of a defendant's character or record. Parole eligibility or ineligibility is a legislative determination; it is not mitigating evidence. See State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989), vacated on other grounds 493 U.S. 1013 (1990) (information regarding requirements for parole eligibility is not mitigating evidence); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. denied, 489 U.S. 1091 (1989) ("punishment for a crime cannot serve as a mitigating sentencing consideration"); see also State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (the general effect of capital punishment as a deterrent to crime is not a mitigating circumstance). The Eighth Amendment is not violated by refusing to inform the jury a capital defendant is parole ineligible.

Appellant asserts since all capital defendants are now parole ineligible, the Court should permit juries to be informed of parole ineligibility. He claims providing juries with accurate information on parole ineligibility will eliminate prejudicial misinformation juries hold concerning parole eligibility and produce more reliable sentencing determinations. We disagree.

Traditionally, in South Carolina it is the jury's duty and responsibility in the sentencing phase of a capital trial to impose a punishment authorized by law in consideration of the circumstances of the crime and the characteristics of the individual defendant. The jury is not authorized to legislate a plan of punishment. State v. Plath, 281 S.C. 1, 313

S.E.2d 619, cert. denied 467 U.S. 1265 (1984); see State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111 (1970), citing State v. White, 142 A.2d 65, 76 (N.J. 1958) ("the Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs."), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The jury's duty is the same under the new sentencing statute. While a defendant's parole ineligibility could affect the jury's decision, it nonetheless remains an irrelevant factor which the jury should not consider. Affirmatively mentioning an irrelevant factor would undermine the jury's decisionmaking process and result in a decision which is less, rather than more, reliable. As a matter of policy, we maintain it is inappropriate to inform the jury the capital defendant is parole ineligible. The Eighth Amendment does not compel a different result. Jones v. United States, 527 U.S. 373, ___, 119 S.Ct. 2090, 2099 (1999) (a death sentence is not arbitrary within the meaning of the Eighth Amendment "if the jury is not given any bit of information that might possibly influence the individual juror's voting behavior.").

C.

Appellant argues the trial judge's supplemental instruction was erroneous. He contends 1) in responding to the jury's questions, the trial judge should have informed the jury he was parole ineligible, 2) the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," incorrectly suggested he was parole eligible, and 3) the trial judge erred by refusing to read that portion of the sentencing statute which referred to parole ineligibility. We disagree.

1.

As noted above, parole eligibility or ineligibility is not relevant to a capital jury's sentencing considerations and the issue of parole should not be injected into the jury's deliberations. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). When a *jury inquires* about parole, the trial court should instruct the jury it shall not consider parole eligibility in reaching its decision and the terms

"life imprisonment" and "death penalty" should be understood in their ordinary and plain meaning. State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).[12]

In keeping with Norris, the trial judge's supplemental instruction properly told the jury not to consider parole eligibility or ineligibility. Although Norris was decided prior to the new sentencing statute, we find no reason to require a different response when the jury inquires about parole.

Moreover, as noted above, three potential sentences were available: 1) death, 2) life imprisonment, or 3) a mandatory minimum thirty year sentence. Appellant was not eligible for parole under any of these sentences.[13] Nonetheless, as suggested by appellant, by asking for information on parole, the jury was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment. Informing the jury appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

2.

Furthermore, contrary to appellant's argument, the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," did not suggest appellant was parole *eligible*. Unlike the admonitions in Simmons v. South Carolina, 512 U.S. 154 (1994), "you are not to consider parole" and parole "is not a proper issue for your consideration," the instruction here specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole

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[12]In Ard we held the trial judge's erroneous mention of parole was harmless. To the extent Ard suggests the trial judge should charge the jury on parole eligibility if requested by the defendant, it is overruled. We note Ard was decided eight months after the present case was tried.

[13]But see footnote 7.

eligible.

3.

Finally, in response to the jury's questions, appellant requested the trial judge read that portion of the sentencing statute highlighted below:

> A person who is convicted of or pleads guilty to murder must be punished by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. **If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, 'life imprisonment' means until the death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.** No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.

Section 16-3-20(A) (Supp. 1998).

We find no error or prejudice from the trial judge's refusal to read the highlighted portion of the statute. Again, neither parole eligibility nor parole ineligibility are proper considerations for the jury. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Furthermore, appellant's suggestion that providing the jury with the highlighted language would promote "truth-in-sentencing" is

tenuous. The highlighted text provides the jury with only those portions of the sentencing statute which appellant deems favorable but excludes any reference to other less favorable sentencing options.

We conclude the supplemental instruction was appropriate.

II.

Appellant argues he was deprived of his right to make religious arguments to the jury. We disagree.

Over appellant's objection, the trial judge granted the State's motion to prohibit references to the Bible or religion during closing argument by both the prosecution and defense. Appellant proffered several religious arguments he had considered including in his closing argument.

In his closing argument, appellant stated:

> There's a story about a woman who broke the law a long, long, long time ago. Before we had electricity, before we had lethal injection, we still had the death penalty. There was a time that she had been caught, she was caught for breaking the law, and the people in her community gathered around her, and they were going to kill her for what she had done. They had the objects they were going to use to kill her in their hands, and she stood before them. Somebody walked in and said 'I'm not denying that what she did was wrong, this isn't about what she did was wrong, this is about what statement are you going to make about being confronted with this.'
>
> The story that I referenced, a very great man discussed with them about not killing the woman, and they didn't.

We find no error in the trial judge's ruling. Previously, we have held there is no fundamental unfairness when the trial judge precludes the solicitor and the defense from arguing about God or religion. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied 522 U.S. ___, 118 S.Ct. 146 (1997). In any event, the record clearly demonstrates appellant was not prejudiced by the trial judge's ruling. Although he was not permitted to

make all of his religious arguments, appellant conveyed the Biblical story of Jesus and the adulterous woman. State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (capital defendant was not prejudiced by sustained objection to his religious argument where record indicated he made the argument nonetheless). The trial judge did not abuse his discretion in granting the State's motion to prohibit references to the Bible or religion during both the prosecution and defense closing arguments. See State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986)[14] (trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed).

III.

In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.

In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).[15] Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.

Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general

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[14]Overruled on other grounds Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Casey, 305 S.C. 445, 409 S.E.2d 391 (1991).

[15]Because the General Assembly has approved the propriety of capital punishment, evidence attempting to establish its effectiveness or ineffectiveness as an instrument of deterrence is irrelevant.

deterrence. See State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied 519 U.S. ___, 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge general deterrence need not be considered); State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), cert. denied 471 U.S. 1036 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatedly allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168, cert. denied 498 U.S. 1074 (1990); State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied 462 U.S. 1124 (1983), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

PROPORTIONALITY REVIEW

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance is supported by the evidence. See S.C. Code Ann. § 16-3-25 (1985). Further, we hold the death penalty is neither excessive nor disproportionate to that imposed in similar cases. See State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997), cert. denied, 523 U.S. ___, 118 S.Ct. 1674 (1998); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. ___, 118 S.Ct. 146 (1997); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, cert. denied, 520 U.S. ___, 117 S.Ct. 2460 (1996); State v. Humphries, 325 S.C. 28, 479 S.E.2d 52, cert. denied, 520 U.S. ___, 117 S.Ct. 2441 (1996); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied, 519 U.S. ___, 117 S.Ct. 695 (1997); State v.

Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), cert. denied, 502 U.S. 1103 (1992).

AFFIRMED.

MOORE, WALLER, JJ., and Acting Justice Thomas C. Huff, concur. FINNEY, C.J., dissenting in a separate opinion.

FINNEY, C.J.: I respectfully dissent, and would reverse and remand for a new sentencing proceeding.

Under the 1996 amendments to S.C. Code Ann. § 16-3-20, all capital defendants face one of three sentences:

> (1) death; or
>
> (2) life in prison until death; or
>
> (3) unconditional release after service of a minimum term of thirty years, with no possibility of parole.[1]

Appellant contends that since he was parole ineligible as a matter of state law, the jury was entitled to be charged this fact when they inquired. I agree.

The majority deems the holding in Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994), inapplicable because appellant's sentencing options were not limited to death or life without

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[1]In this opinion and in State v. Starnes, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000), the Court has avoided directly deciding the parole eligibility status of a capital defendant who receives a term of years sentence. In my opinion, we must decide this question today in order to address the jury charge issues raised by appellant. The murder statute is clear as to certain defendants: "No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole. . . or any other credits which would reduce the mandatory minimum term of imprisonment for thirty years required by this section." § 16-3-20(A) (Supp. 1999). Since the murder statute is silent as to the parole eligibility of defendants receiving a sentence in excess of the mandatory minimum, the general rule controls. Under § 16-1-10(d) (Supp. 1999), murder is exempt from the classification system, and under § 24-13-100 (Supp. 1999), persons convicted of exempt offenses are ineligible for parole. Thus, although a capital defendant may receive a sentence of a term of years, he is ineligible for parole whatever the duration of that term.

possibility of parole, and cites a number of cases in support of this proposition. In all the cited cases except one, however, the defendant's sentencing possibilities included one in which he would be parole eligible. The only case in which the defendant did not face a potential parolable sentence was United States v. Flores, 63 F.3d 1342 (5th Cir. 1995). Flores involves a federal conviction, and parole has been abolished in the federal system. It is inapposite to the present South Carolina sentencing scheme, as are all the other cases cited. While I concede that Simmons does not directly control this case[2], the overriding principle to be drawn from that decision is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected. Here, the jury's inquiry prompted a misleading response which suggested parole was a possibility. In my opinion, due process mandates reversal.

Further, if the decision whether to inform juries which inquire about parole eligibility is simply one of policy, as the majority suggests in Part I C, then why not adopt a policy which gives the jurors the simply truth: no parole. The majority acknowledges, as it must,[3] that parole considerations "could" affect a jury's sentencing decision,[4] but then deems it "irrelevant" and denigrates its importance as "[a] bit of information that might possibly influence the individual juror's voting behavior." The specter of parole haunts every capital sentencing proceeding in this State, and I cannot understand why, given the simplicity of our new sentencing scheme in which no capital defendant is ever parole eligible, we would make a policy decision prohibiting the dissemination of the truth.

Of course, I would not stop with a charge that the defendant was

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[2]We are not concerned with whether a Simmons charge was warranted at the initial charge to the jury since future dangerousness was not an issue, but rather with the procedure to be followed when a capital jury inquires about parole.

[3]Given the regularity with which capital juries inquire about parole, we cannot deny its role in sentencing.

[4]See Bowers, Vandiver & Dugan, *A New Look at Public Opinion On Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J.Crim.L. 77 (1994).

not parole eligible, for that is only half the truth. I would tell the jury that if no aggravating circumstance is found, the defendant faces a minimum of thirty years without possibility of early release, but that if aggravating circumstances are found, then the alternatives are death or life in prison until death.

For these reasons, and with instructions that henceforth juries which inquire shall be charged the truth about sentencing, I would reverse and remand for a new sentencing proceeding in this matter.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent.

v.

Norman E. Starnes, Appellant.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 25119
Heard September 21, 1999 - Filed May 8, 2000

REVERSED

Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Bill Welborn and Jarrod Champlin. He maintained the shootings were in self-defense. Appellant was convicted of two counts of murder and possession of

a firearm during the commission of a violent crime. The jury found one statutory aggravating circumstance and recommended a sentence of death.[1] The trial judge sentenced appellant to death and a concurrent sentence of five years' imprisonment. We reverse.

FACTS[2]

Jody Fogle testified appellant arrived unexpectedly at his home at 10:00 p.m. on January 8, 1996. According to Fogle, appellant told him he wanted help moving some things. During the drive to appellant's home, appellant told Fogle about two men who had put a gun to his head and threatened to kill him. Fogle stated appellant demonstrated by holding a .22 gun to his head. Fogle testified he took the gun from appellant, determined it was loaded, then placed it on the car seat. A .38 revolver was on the dash of the car.

Fogle testified Welborn and Champlin were at appellant's home. He denied meeting either Welborn or Champlin previously. Fogle described Welborn and Champlin as "wired" as if on drugs. Champlin asked appellant to return his gun. Appellant gave Champlin the .22, the same gun appellant had been handling in the car. Appellant went into his bedroom; Fogle could hear appellant fumbling around in the bedroom.

Fogle testified Champlin asked him if he had a gun. Fogle responded negatively. Champlin "chambered a round" in the gun, worked the slide, came towards Fogle stating "[I'm] going to kill you and bring a__" and pointed the gun at Fogle's chest. Fogle testified he could tell Champlin was serious; he admitted, at that time, he would have shot Champlin if he had been able. Welborn told Champlin to give him the .22 and Champlin complied. A couple of seconds later, appellant shot Welborn three times with the .38 revolver.

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[1]"Two or more persons were murdered by the [defendant] by the act of pursuant to one scheme or course of conduct." S.C. Code Ann. § 16-3-20(C)(a)(10) Supp. 1998).

[2]The evidence is recited in the light most favorable to appellant.

Appellant testified Fogle had previously met Welborn. He explained while at a New Year's Eve party ten days before the shooting. Welborn asked appellant if he knew where he could get some crystal "meth," an illegal drug. Appellant stated no one at the party had the drug. Later, Fogle arrived at the party. Appellant testified Fogle had crystal methamphetamine. Appellant introduced Fogle to Welborn. He was not certain if a drug transaction occurred, but Welborn inquired if there was an automatic teller machine at the bank next door.

Appellant testified two nights before the shootings Welborn put an unknown amount of money in his pocket. Later the same evening, he returned the money to Welborn; he was unsure if he returned all of the money.

Appellant testified on January 8, 1996, he was at the restaurant he owned when Welborn and Champlin arrived. Welborn remained outside in a car. Appellant went outside and asked Welborn why he did not come inside and Welborn stated appellant owed him $40. Appellant gave Welborn $40 from the restaurant cash register and Welborn came inside the restaurant. Appellant described Welborn as "real agitated," "wired," "just acting unusual," "just full of energy." Appellant described Champlin as "hyper."

Appellant, Welborn, and Champlin left the restaurant. Appellant testified Welborn asked if appellant was afraid to die and commented about the $40. The three men went to a bar. Appellant testified Welborn was "still acting real antsy," "pacing the pool table." He thought Welborn was "coming down off of a high." Appellant described Champlin as "antsy, kind of wired, same as [Welborn] was acting, but not as bad."

Appellant stated while he was in the [illegible] at the bar, Welborn came up behind him, grabbed him around the neck, and hit him on the head with a metal object which he thought was Welborn's gun or cigarette lighter. Welborn asked again about the $40 and stated, "you'd [illegible] to your fing friends like that."

Appellant left the bar with Welborn and Champlin.[3] He testified Welborn and Champlin asked him to get them some drugs. Appellant left Welborn and Champlin at his home and went to Fogle's home. He testified he did not take Welborn and Champlin with him because Fogle had previously told him he did not want any customers at his home.

Appellant picked up Fogle and drove him to his [appellant's] home in order for Fogle to provide Welborn and Champlin with drugs. Appellant testified when he and Fogle entered his house, Welborn was on the telephone. Welborn hung up, put his arm around appellant's neck, and asked if they were going to "score." Appellant heard some noise. Champlin was cursing and pointing a gun at Fogle. Appellant testified he thought Champlin was going to shoot Fogle. He stated he had no idea why Champlin pulled a gun on Fogle.

Appellant stated he was scared and ran into his bedroom to "get away." He realized there was no exit, obtained his pistol, placed it in his back pocket, and returned to the living room in order to leave through the front door. He was opening the front door when Welborn yelled "Whoa. Where the F are you going?" Appellant turned around; Welborn was pointing a gun at him. Appellant testified he thought Welborn was going to shoot him. When he heard a "click," appellant pulled his revolver and shot Welborn multiple times. Welborn did not fire any shots.

Appellant testified he immediately thereafter shot Champlin, although he agreed he was not paying attention to Champlin and Fogle while he was in the bedroom and while he was reacting to Welborn. He testified he shot Champlin because "I thought he was going to shoot me." He admitted Champlin never pointed a gun at him. Appellant testified he did not know Champlin had given his gun to Welborn and Champlin was no longer armed. Appellant concluded he shot Welborn and Champlin "[b]ecause I thought I was going to get shot."

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[3]A waitress testified as appellant and Welborn left the bar, Welborn stated to her in front of appellant, "you need to call Lexington County because [I am going to take appellant] up on Platt Springs Road and blow his fing brains out."

GUILT PHASE ISSUES

I. Did the trial judge err by refusing to instruct the jury that, in regard to self-defense, a defendant has a right to act on appearances and does not have to wait before acting?

II. Did the trial judge err by refusing to instruct the jury on defense of others?

III. Did the trial judge err by refusing to allow the defense to question an inmate concerning allegations the prosecution had attempted to procure false testimony?

IV. Did the trial judge err by refusing to allow the defense to impeach Dawn Brudos by establishing she had a romantic relationship with Welborn?

I.

Appellant argues the trial judge erred by refusing to provide the jury with more specific instructions regarding self-defense. He contends the judge should have instructed the jury A) he had the right to act on appearances and B) he did not have to wait before shooting. We agree.

With regard to self-defense, the trial judge instructed the jury, in part, as follows:

> Self-defense is a complete defense. If established you must find the defendant not guilty. Now, in this case there are three elements that you would consider that are required by law to establish self-defense. First, first [sic], the defendant must be without fault in bringing on the difficulty. Second, he must have actually believed, actually believed [sic] that he was in imminent danger of losing his life or sustaining serious bodily injury or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, then the reasonable person of ordinary firmness and courage would have entertained the same belief. If a defendant actually was in imminent danger, then the circumstances must have been such as would warrant a

> person of ordinary firmness, prudence and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life.[4]

(Emphasis added).[5]

A.

In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), this Court held it error for the trial judge to exclusively charge the Davis instruction on self-defense when the defendant requests additional charges and the evidence supports the requests. The Court instructed the trial court to fashion an appropriate self-defense charge based on the facts and circumstances of each case.

In Fuller, the defendant requested a charge that he had the right to act on appearances. Quoting State v. Jackson, 227 S.C. 271, 278-279, 87 S.E.2d 681, 684-685 (1955), the Court set forth an appropriate charge on right to act on appearances:

> A defendant must show that he believed he was in imminent danger, not that he was actually in such danger, because he had

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[4]The language is taken directly from State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984).

[5]Appellant submitted written proposed jury instructions. Request to Charge No. 3 states: "If a person's right to fire in self-defense arises, he is not required to wait until his opponent is on equal terms or until his opponent has fired or aimed his weapon." Request to Charge No. 5, in part, states: "The defendant had the right to act on the appearance of things at the time, taken in light of all the evidence. One has the right to interpret the conduct of the other party in light of all of the circumstances at the time of the incident." During the charge conference, appellant stated, in addition to the standard State v. Davis, supra, self-defense instruction, he also requested the judge instruct the jury on "[a]ppearances and whatnot and so forth." The trial judge indicated the substance of appellant's proposed instructions were included in his charge.

> the right to act on appearances, and under the circumstances as they appeared to him, he believed he was in such danger and a reasonable prudent man of ordinary firmness and courage would have entertained the same belief.

State v. Fuller, supra S.C. at 443-444, S.E.2d at 331; see also State v. Gandy, 113 S.C. 147, 148, 101 S.E. 644 (1919) ("A man may act, however, from appearance, and if it turns out, if the appearances are such that a man of ordinary courage, firmness, and prudence would have been justified in coming to the conclusion that the necessity did then and there exist to strike to save himself from serious bodily harm or death that would be sufficient, although it turned out afterwards that there was no actual danger present, and that the necessity to strike did not exist.").

Appellant was not entitled to an appearance charge in regard to the Welborn shooting. According to appellant, he was in actual danger when Welborn pointed a gun at him, cursed him, and questioned him as to where he was going. Appellant's claim to self-defense did not arise from a perceived, but rather an actual threat. Since there was no evidence appellant was acting on appearances, he was not entitled to an appearance charge. See State v. Lewis, 328 S.C. 273, 494 S.E.2d 115 (1997) (defendant not entitled to insanity charge where no evidence supported the charge).

The State contends appellant was not entitled to an appearance charge with respect to the Champlin shooting because he did not testify he thought he saw a gun in Champlin's hand at the time of the shooting. We disagree.

The right to act on appearances is not limited to the situation where the defendant testifies he mistakenly thought he saw a weapon in the victim's hand. While an appearance charge is appropriate when the defendant erroneously believes he sees the victim with a weapon, it has

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See State v. Nichols, 325 S.C. 111, 481 S.E.2d 113 (1997) (where defendant testified he saw a shiny object in victim's hand and thought it was a gun, he was entitled to charge on appearances); State v. Fuller, supra (where defendant testified he saw two victims open the trunk of their vehicle and thought he saw a shiny object in one victim's hand, he was entitled to

been applied elsewhere. In State v. Jackson, supra, the defendant testified he shot the victim after being awakened in his home by an intruder and blinded by a flashlight. The defendant did not testify he saw what appeared to be a weapon in the victim's hand. In fact, the defendant testified he could not see anything. The Court held the defendant was entitled to a charge on self-defense, including language on appearances.[7]

Appellant was entitled to an appearance charge in regard to the Champlin shooting. Immediately prior to the shooting, appellant observed Champlin hold a gun to Fogle's head and threaten to shoot him, apparently because the intended drug deal, which appellant had arranged, had gone awry. Welborn then pointed a gun at appellant and threatened to kill him as he attempted to leave. Unaware Champlin had passed his weapon to Welborn when appellant was in the bedroom, appellant erroneously believed Champlin was armed and intended to kill him. The trial judge should have charged the jury appellant had the right to act on appearances.[8] State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996) (the law to be charged is determined from the evidence presented at trial). Refusal to give a requested instruction on appearances necessitates reversal. State v. Nichols, supra; State v. Fuller, supra.

B.

In charging self-defense, the trial court must consider the facts and circumstances of the case in order to fashion an appropriate charge. State v. Fuller, supra. Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is in equal [illegible]

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charge on appearances.

[7] In older cases, the reference to "acting on appearances" was [illegible] in the [illegible] of the self-defense charge [illegible] imminent danger. See State v. Pridmore, 163 S.C. 71, 161 S.E. 9 (1931); State v. Francis, 163 S.C. 182, 152 S.E. 477 (1930); State v. [illegible], 143 S.C. 311, 141 S.E. 104 (1928).

[8] Here, the jury would also have to find it was [illegible] of ordinary firmness and courage would have believed he was in [illegible] danger under the circumstances.

until he has fired or aimed his weapon in order to act. State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). Similarly, "[the accused] doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant (sic) getting the drop on him." State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936).

The facts presented at trial entitled appellant to a self-defense charge in regard to both shootings. Appellant testified Welborn pointed a gun at him and he believed Champlin was armed. Appellant did not have to wait for Welborn or Champlin to fire or aim at him before acting in self-defense. Accordingly, appellant was entitled to a charge instructing the jury he did not have to wait before acting in self-defense. Refusal to charge this request was reversible error. State v. Nichols, supra (where defendant requested charge he did not have to wait before acting in self-defense and the trial court gave a common-law instruction on self-defense, refusal to give the requested charge was reversible error).

II.

Appellant argues the trial judge erred by refusing to instruct the jury on defense of others. We disagree.

Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); see also William S. McAninch & W. Gaston Fairey, The Criminal Law of South Carolina (3rd ed. 1996) ("There must, of course, be some evidence that the defendant was defending others at the time of his act in order for him to be entitled to the instruction.").

Appellant was not entitled to a charge on defense of others. Appellant testified after Champlin threatened Fogle, he went into his bedroom "to get away." He realized there was no exit, obtained his revolver, then returned to the living room to leave through the front door. At this point, Welborn verbally threatened appellant and pointed a gun at him.

Appellant specifically maintained he shot Welborn and Champlin because he thought they were going to shoot him. At no point did appellant suggest he shot either Welborn or Champlin to protect Fogle. Accordingly, he was not entitled to a charge on defense of others. See State v. Alford, 264 S.C. 26, 212 S.E.2d 252 (1975) (where defendant did not testify he was shooting for purpose other than to protect himself, he was not entitled to charge on defense of others).

III.

Appellant argues the trial court erred by refusing to allow the defense to question an inmate concerning allegations the prosecution had attempted to procure false testimony. We disagree.

Appellant testified in his own defense. On cross-examination, appellant denied while awaiting trial he told four inmates he planned to murder Welborn and Champlin, pre-dug their graves, and wanted to hire someone to kill Gwen Ott.[9] Thereafter, appellant called Chris Kopel as a defense witness. Kopel testified for several months he was appellant's cellmate in the Lexington County Detention Center. He testified an assistant solicitor met with him and asked him if he had ever heard appellant threaten Ott's life. Kopel responded negatively. The solicitor objected.

During a proffer, Kopel stated the assistant solicitor asked him if he would be willing to testify that he had heard appellant threaten Ott. Kopel believed the assistant solicitor was asking him to lie. The trial judge sustained the objection, stating appellant could cross-examine the four inmates if the State called them in reply. In reply, four inmates testified appellant told them he had planned to kill Welborn and Champlin, had pre-dug their graves, and wanted to hire someone to murder Ott. No testimony concerning actions on behalf of the Solicitor's Office or Sheriff's Department was elicited from these witnesses.

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[9] At the time of the shootings Ott was appellant's live-in girlfriend. Ott helped appellant bury Welborn and Champlin. She reported appellant's involvement in the shootings in May 1996.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE.

Kopel's testimony was irrelevant to any issue at trial. His testimony neither established the prosecution actually presented perjured testimony at appellant's trial nor impeached the testimony of the four inmates who testified in reply as he did not state the prosecution had attempted to procure false testimony from them. Moreover, the allegation the assistant solicitor attempted to procure false testimony is not relevant to the issues in appellant's trial. The trial judge did not abuse his discretion in ruling Kopel's testimony inadmissible. State v. Lewis, 293 S.C. 107, 359 S.E.2d 66 (1987)(admission or rejection of proffered testimony is within the sound discretion of the trial judge; absent an abuse of discretion, the ruling will not be disturbed on appeal).[10]

IV.

Appellant argues the trial court erred by refusing to allow the defense to impeach Dawn Brudos by establishing she had a romantic relationship with Welborn. We agree.

Brudos was the first witness offered at trial. She testified she had known Welborn since 1993 and worked for his skydiving business. She testified Welborn, Champlin, and Champlin's girlfriend had been living in her home since mid-December 1995. Brudos testified two nights before the shootings Welborn was upset appellant had not returned $40 to him.

On cross-examination, defense counsel asked if Brudos had a romantic relationship with Welborn at the time of his death. She answered affirmatively. The solicitor objected. Defense counsel argued the question was relevant to establish Brudos' bias. After an in camera hearing, the trial judge sustained the objection and instructed the jury to disregard the question and answer.

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[10] Allegations of improper conduct by the Solicitor's Office could be raised at a hearing on prosecutorial misconduct.

The Sixth Amendment guarantees a criminal defendant the right to meaningful cross-examination of adverse witnesses. "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in *otherwise appropriate* cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose the jury to the facts from which jurors . . . could appropriately draw inferences relating to reliability of the witness.'" Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986)(emphasis added), quoting Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 105, 111, 39 L.Ed.2d 347, 353 (1974). A trial judge, however, may impose limits on defense counsel from inquiry into the potential bias of a prosecution witness to prevent harassment, prejudice, confusion of the issues, repetitive or marginally relative examination. Id.

Rule 608(c), SCRE, also permits a party to impeach a witness by establishing bias or prejudice either through examination or otherwise. "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976), quoting 98 C.J.S. Witnesses § 560a (1957). A witness' romantic relationship with a party is a source of potential bias of which the jury should be aware in order to fully evaluate the witness' testimony. McIntyre v. State, 934 P.2d 770 (Alaska App. 1997); Orkin Exterminating Co., Inc. v. McIntosh, 452 S.E.2d 159 (Ga. App. 1994); State v. Erby, 299 S.E.2d 86 (N.C. App. 1982).

Under both the Sixth Amendment and Rule 608(c), SCRE, appellant was entitled to inquire if Brudos had a romantic relationship with Welborn. Certainly, an intimate relationship between Brudos and Welborn could affect Brudos' credibility. The trial judge erred by prohibiting appellant from making this inquiry.[11]

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[11] Although it is appropriate to perform a harmless error analysis when a party alleges he was denied the right to cross-examine a witness fully, such an analysis is unnecessary here because appellant has been granted a new trial.

SENTENCING PHASE ISSUE

V. Did the trial judge err by refusing to instruct the jury appellant was ineligible for parole?

V.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends the trial judge's refusal to instruct the jury that he was parole ineligible violated his due process rights.[12] We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. Simmons v. South Carolina, 512 U.S. 154 (1994); State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raises[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society." Simmons v. South Carolina, supra, U.S. at 165 (plurality opinion).[13]

At the time Simmons was decided, South Carolina's capital sentencing scheme provided if the jury did not find a statutory aggravating circumstance, a death-eligible defendant was sentenced to life imprisonment and eligible for parole in twenty years. If the jury found a statutory aggravating circumstance and did not recommend death, the defendant was sentenced to life imprisonment and eligible for parole in thirty years. S.C. Code Ann. § 16-3-20(A)(Supp. 1993). However, if the defendant had a prior conviction for certain violent crimes, he was ineligible for parole. S.C. Code

[12]U.S. Const. amend. XIV, cl. 1. Appellant does not allege an Eighth Amendment violation.

[13] For purposes of this discussion, we assume the solicitor placed appellant's future dangerousness in issue.

Ann. § 24-21-640 (Supp. 1993).[14]

By Act No. 83, §10, 1995 Acts 557, the General Assembly amended the sentencing options for capital murder. Effective January 1, 1996, § 16-3-20 (Supp. 1998) provides, in relevant part, as follows:

> (A) A person who is convicted of . . . murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt . . .. and a recommendation is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. . . .
>
> (B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. . . .

Emphasis added.

[14]Simmons was parole ineligible pursuant to § 24-21-640.

Under the new sentencing scheme, if the jury does not find a statutory aggravating circumstance, a death-eligible defendant may be sentenced to either life imprisonment or a mandatory minimum thirty year sentence at the discretion of the trial judge. Under either sentence, the defendant is ineligible for parole or any form of credit which would reduce the length of the sentence. However, if sentenced to the mandatory minimum sentence, the defendant would be unconditionally released from prison at the completion of thirty years.

Simmons is inapplicable under the new sentencing scheme. By its own terms, Simmons requires the jury be informed the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is legally available to the defendant. Id., U.S. at 178 (O'Connor, J., concurring)("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole. . ."(emphasis added).[15] This interpretation is supported by decisions from other jurisdictions. Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999)(Simmons is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996)(because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and, therefore Simmons is inapplicable); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 514 U.S. 1108 (1995)(Simmons applies where capital defendant is ineligible for parole as a matter of law; Simmons does not apply even if it is unlikely defendant would be paroled); People v. Simpson, 665 N.E.2d 1223 (Ill.), cert. denied, 519 U.S. 982 (1996)(Simmons inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); State v. McLaughlin, 462 S.E.2d 1 (N.C. 1995), cert. denied, 517 U.S. 1111 (1996)(Simmons inapplicable where alternative to death is not life

[15]Keel v. French, 162 F.3d 263, 270 (4th Cir. 1998)(recognizing "that Justice O'Connor's concurrence actually represents the holding in Simmons.").

imprisonment without possibility of parole). Under the new statute, a sentence other than life without the possibility of parole is an available alternative to the death penalty.[16]

Moreover, the rationale for Simmons simply does not exist when there is a potential mandatory minimum thirty year sentence. Contrary to a sentence of life imprisonment without the possibility of parole, a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society. For this same reason the Court has repeatedly declined to apply Simmons when the defendant is parole eligible. State v. Hill, 331 S.C. 94, 501 S.E.2d 122, cert. denied, 525 U.S. ___, 119 S.Ct. 597 (1998); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, cert. denied, 520 U.S. 1277 (1996); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied, 519 U.S. 1061 (1997). Accordingly, because a mandatory minimum thirty year sentence was a legally available sentence, appellant's due process was not violated when the trial judge refused to instruct the jury appellant was parole ineligible.[17]

Additionally, appellant argues because the jury had already convicted him of two murders, it was bound to find the statutory aggravating circumstance of "two or more persons murdered by the defendant by one act or pursuant to one scheme or course of conduct" and, therefore, the only available sentence alternative to death was life without the possibility of parole. We find it inappropriate to assume the jury will find a statutory aggravating circumstance. Appellant's jury could have concluded that while appellant murdered Welborn and Champlin, the two murders were not

[16]The dissent contends the cases cited herein are inapposite. As explained in State v. Shafer, Op. No. 25120 (S.C. Sup. Ct. filed May 8, 2000 (Shearouse Adv. Sh. No. 18 at 35), each of the referenced cases fully support the conclusion due process did not require the trial judge to instruct the jury appellant was parole ineligible.

[17]Further, we note the sentencing statute provides for a mandatory minimum thirty year sentence. Based on the language of the statute, it is arguable a defendant sentenced to more than thirty years is eligible for parole after service of thirty years.

pursuant to one scheme or course of conduct beyond a reasonable doubt. Because the jury could have failed to find the existence of a statutory aggravating circumstance, a potential mandatory minimum thirty year sentence existed and appellant was not entitled to a charge on parole ineligibility. United States v. Flores, supra (district court did not violate the principles of Simmons by refusing to inform the jury the defendant would be sentenced to life imprisonment without possibility of parole because a lesser sentence, dependent on the jury's findings, was available).

REVERSED.

TOAL, MOORE, JJ., and Acting Justice William T. Howell, concur. FINNEY, C.J., dissenting in a separate opinion.

FINNEY, C.J.: I respectfully dissent from the majority's opinion insofar as it holds appellant was not entitled to a jury charge that he was parole ineligible pursuant to Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994). As I explained in my dissent in State v. Shafer, Op. No. 25120, (S.C. Sup. Ct. filed May 8, 2000) **all** capital defendants are now parole ineligible under the 1996 amendments to S.C. Code Ann. § 16-3-20 (Supp. 1999). Appellant thus meets the two prerequisites for a Simmons charge: (1) parole ineligibility and (2) argument regarding future dangerousness. All the state cases cited by the majority as supporting its decision not to apply Simmons are distinguishable because in each the defendant faced a potentially parolable sentencing option under state law. The decision in United States v. Flores, 63 F.3d 1342 (5th Cir. 1995) is simply unhelpful since parole has been abolished in the federal system. For these reasons, and the reasons given in my Shafer dissent, I would reverse the denial of appellant's request for a Simmons charge.

in three specific areas." State v. Cooper (S.C. 1998) 334 S.C. 340, 514 S.E.2d 584

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for [illegible] mitigating circumstances otherwise authorized or allowed by law and

the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445;

(h) physical torture; or

(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for

thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

HISTORY: 1985 Act No. 104, § 1, eff May 21, 1985; 1986 Act No. 462, § 27, eff June 3, 1986; 1990 Act No. 604, § 15, eff June 25, 1990; 1992 Act No. 488, § 1, eff July 1, 1992; 1995 Act No. 83, § 10, eff January 1, 1996; 1996 Act No. 317, § 1, eff May 20, 1996.

Editor's Note—

1990 Act No. 604, § 17, eff June 25, 1990, provides as follows:

"This act takes effect upon approval by the Governor. A person arrested, charged, or indicted under those provisions of law amended by this act must be tried and sentenced and any administrative penalty or suspension exacted as provided by the law in force at the time of the commission of the crime."

Effect of Amendment—

The **1985** amendment rewrote subsection (A) to provide that when a sentence of death is commuted, the commutee is not eligible for parole.

The **1986** amendment made grammatical changes; revised subsection (A) by adding the provision relative to the sentence to be imposed when an aggravating circumstance is found beyond a reasonable doubt but a recommendation of death is not made, and by substituting "mandatory imprisonment" for "mandatory twenty years' imprisonment" in the last sentence; revised subsection (B) by substituting "trial by jury" for "the trial jury", and by substituting "the sentence to be imposed" for "the sentence of death" and for "the sentence imposed"; revised subsection (C) by rewriting subitem (a)(7), by adding subitems (a)(8) and (9), and by adding the provisions relative to juries which do not recommend death despite finding an aggravating circumstance beyond a reasonable doubt, questioning the jury, prior to its dismissal, as to whether it found an aggravating circumstance beyond a reasonable doubt, and designation of such a finding in a writing signed by all members of the jury; and revised subsection (E) by substituting "verdict according to law" for "verdict of guilty according to law".

The **1990** amendment revised subsection (C)(a).

The **1992** amendment, in subsection (C), item (b), added subitem (10).

The **1995** amendment substantially revised this section.

The **1996** amendment in subsection (C), item (a), added subitem (11).

Cross References—

Commission of this crime within specified radius of child day care center as separate offense, see § 20-7-3093.

Governor's power to commute sentences, see the South Carolina Constitution, Article IV, § 14.

Final judgment from the circuit court involving a sentence under Article I of this chapter is not to be transferred to the Court of Appeals, see Rule 214, SCACR.

Research and Practice References—

13 Am Jur 2d, Burglary § 73.5.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

No. 00-5250

Wesley Aaron Shafer, Jr.

Petitioner,

v.

State of South Carolina,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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11pp

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ARGUMENT IN REPLY

1. South Carolina has failed to reconcile the decision below with Ramdass v. Angelone.

Just five weeks before this Court's decision in Ramdass v. Angelone, 120 S.Ct. 2113 (2000), the South Carolina Supreme Court held in this case that, with a few exceptions, South Carolina capital defendants no longer enjoy the protection of Simmons v. South Carolina, 512 U.S. 154 (1994). As petitioner has already pointed out, Pet. for Cert. at 18-19, Ramdass removes any possible doubt concerning the applicability of Simmons to the current South Carolina sentencing scheme. The Attorney General of South Carolina nevertheless emphasizes a phrase from Justice Kennedy's plurality opinion which, he believes, supports the judgment below. This is the statement that Simmons does not extend "to cases where parole ineligibility has not been established as a matter of state law at the time of the jury's future dangerousness deliberations in a capital case." 120 S.Ct. at 2119 (emphasis supplied by respondent). What the state overlooks is that under the current South Carolina sentencing procedure, "the time of the jury's future dangerousness deliberations in a capital case" does not arrive until after the jury's unanimous finding of at least one statutory aggravating circumstance. S.C. Code § 16-3-20(C). Indeed, the jury is not permitted to sentence at all until it first finds an aggravating factor rendering the defendant eligible for the death penalty. Id. ("If the jury does not

unanimously find any statutory aggravating circumstance or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation."). If, however, a statutory aggravating circumstance is found, S.C. Code § 16-3-20(B) clearly provides no alternative to the death penalty other than life imprisonment without the possibility of parole ("if a statutory aggravating circumstance is found, the defendant must be sentenced to death or life imprisonment.").

As the Ramdass plurality made clear, "Simmons applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." 120 S.Ct at 2122 (emphasis added). South Carolina has abolished parole and requires capital sentencing juries to decide whether to impose life instead of death. Simmons applies just as much to this scheme as it did to the narrower "two-strikes" no-parole provision at issue in Simmons itself. South Carolina's decision to the contrary is in conflict with Simmons and Ramdass, and warrants summary reversal.

2. With respect to the state's alternative "future dangerousness" contention, the Court should either (a) remand this case to permit the state court to address the state's argument in the first instance or (b) grant review to make clear that the due process rule of Simmons cannot be defeated by the state's purported distinction between evidence and argument on the issue of a defendant's future dangerousness.

As an alternative reason to deny the writ, the state urges that Simmons does not control this case because the prosecution did not "argue" future dangerousness. BIO at 29-33. As petitioner has already pointed out, Pet. for Cert. at 3, n. 2, South Carolina is a non-weighing jurisdiction in which the prosecution is free to prove, and the jury free to consider, the defendant's potential for dangerousness even though that factor is never formally alleged by the state. In this case the prosecution did formally allege future dangerousness in its pretrial notice of evidence in aggravation.[1] At petitioner's sentencing hearing, the state presented most of the evidence listed in the pretrial notice as supporting that factor, including petitioner's prior history of felony sexual abuse convictions, his persistent

[1]The state argues that its pretrial future-dangerousness notice is irrelevant to the Simmons issue because the document was not provided to the sentencing jury. BIO at 31. This misunderstands petitioner's reason for citing it. The notice is relevant because it shows that the prosecution itself believed that its penalty phase evidence proved the nonstatutory factor of future dangerousness, and said so explicitly. This candor gave way to the present semantic hairsplitting only at that point in the proceedings when the state began to focus on the possibility of evading the due process rule of Simmons.

violations of probation, his alleged lack of remorse for the murder, and his explosive response to a minor frustration even within the highly restrictive confines of the county jail. The state nevertheless insisted on direct appeal that the "future dangerousness" requirement of Simmons is not met because the prosecution refrained from asking the trial jury to draw from the state's evidence the commonsense conclusion that petitioner would likely be dangerousness in the future if not executed.

In rejecting petitioner's Simmons claim, the state supreme court did not even mention this alternative argument by the state, much less accept it. The fact that the state court based its decision on a far-reaching constitutional reinterpretation of Simmons suggests that it found no merit to the state's narrower, fact-based "dangerousness" claim. Such a refusal to accept the state's argument would be especially understandable given the jury's parole questions, which suggest that the jury did indeed focus on the issue of petitioner's future dangerousness in its sentencing deliberations. The state nevertheless renews the same argument here, urging this Court to deny certiorari on the alternative ground that by avoiding a too-explicit prediction of future dangerousness in its jury summation at sentencing, the prosecution also avoided the rule in Simmons.

Given that the sole basis of the state court's decision below is its obvious misapplication of the life-without-parole

prong of Simmons, the Court may wish to summarily reverse the judgment and remand for reconsideration in light of this Court's intervening decision in Ramdass. This course of action would afford the South Carolina Supreme Court a second opportunity to address the state's alternative, "future dangerousness" contention. See, e.g., Lilly v. Virginia, 527 U.S. 116, 119 S.Ct 1817, 1901 (1999) (remanding for harmless-error consideration). However, such a course does not always lead to a prompt or efficient resolution of federal constitutional claims, at least where, as here, the state court has already demonstrated some reluctance to enforce the federal right at issue. See, e.g., Yates v. Aiken, 474 U.S. 896 (1985) (remanding for reconsideration in light of Francis v. Franklin, 471 U.S. 307 (1985)); on remand, 349 S.E.2d 84 (S.C. 1986) (error held non-retroactive); rev'd, 484 U.S. 211 (1988); on remand, 391 S.E.2d 530 (S.C. 1989) (error held harmless); rev'd, 500 U.S. 391 (1991). Moreover, to the extent that the plurality and concurring opinions in Simmons can be read to provide any support for South Carolina's insistence that the Simmons right of rebuttal is triggered only by an explicit prosecution jury argument on the subject of future dangerousness, and not by actual evidence of future dangerousness, the Court should use this case to clarify the Simmons rule.

The clearest example of the state's injection of the dangerousness issue in Simmons itself came during the prosecutor's

argument. 512 U.S. at 157, 176. For this reason, the Simmons opinions framed the rule in terms of such argument. E.g., 512 U.S. at 176-77 (O'Connor J., concurring) (Simmons rule not triggered "if the prosecution does not argue future dangerousness."). This phrasing of the rule in Simmons was surely not intended, however, to invite prosecutors to evade Simmons' due process requirement by omitting to mention future dangerousness in jury argument after presenting evidence that assured jury consideration of that factor during deliberations. The rule of fundamental fairness announced in Simmons cannot be defeated simply by removing the dangerousness label from the state's dangerousness case. To the extent that Simmons can be read otherwise, the Court should grant certiorari to make clear that future dangerousness can be put at issue by evidence as well as by jury argument.

CONCLUSION

In this case and in the companion case of State v. Starnes, Op. No. 25120, 2000 WL 576191 (S.C. May 8, 2000), BIO at A-33 to A-37, the South Carolina Supreme Court has declared Simmons v. South Carolina inapplicable to most South Carolina capital sentencing hearings. Until this Court intervenes, South Carolina trial judges will be required by these precedents to conduct capital sentencing proceedings in violation of the rule in Simmons. The Court should grant certiorari and reverse.

Respectfully submitted,

BY: David I. Bruck
DAVID I. BRUCK
Attorney for Petitioner

August 23, 2000

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

No. 00-5250

Wesley Aaron Shafer, Jr.

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petitioner's Reply to Respondent's Brief in Opposition to the Petition For a Writ of Certiorari was served upon counsel for the Respondent by mailing one (1) copy properly addressed with postage prepaid this 23rd day of August, 2000, to:

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August 23, 2000

No. 00-5250

Supreme Court, U.S.
FILED
OCT 18 2000

In The

Supreme Court of the United States

WESLEY AARON SHAFER, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

JOINT APPENDIX

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Petition For Certiorari Filed July 14, 2000
Certiorari Granted September 26, 2000

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May 15, 1997	Petitioner indicted for murder, attempted armed robbery and conspiracy.
May 20, 1997	State serves Notice of Intent to Seek the Death Penalty and Statutory Aggravating Circumstances
November 5, 1997	State serves Notice of Evidence in Aggravation of Punishment
January 12, 1998	Jury selection begins in Union County Court of General Sessions
January 18, 1998	Trial jury find petitioner guilty as charged
January 19, 1998	Penalty phase begins
January 21, 1998	Sentencing jury returns death sentence, and court imposes death sentence on petitioner.
May 8, 2000	South Carolina Supreme Court affirms convictions and death sentence
June 6, 2000	South Carolina Supreme Court grants stay of execution pending petition for writ of certiorari
July 14, 2000	Petition for writ of certiorari filed
September 26, 2000	Petition for writ of certiorari granted

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF UNION)

At a Court of General Sessions, convened on May 15, 1997, the Grand Jury of Union County present upon their oath:

MURDER

That Wesley Aaron Shafer did in Union County on or about April 13, 1997, with malice aforethought, kill one Luther Ray Broome by means of shooting him with a firearm and said victim died as a proximate result thereof, all in violation of Section 16-3-10, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

/s/ T E Pope
SOLICITOR

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF UNION)

At a Court of General Sessions, convened on May 15, 1997, the Grand Jury of Union County present upon their oath:

ATTEMPTED ARMED ROBBERY

That Wesley Aaron Shafer did in Union County on or about April 13, 1997, while armed with a deadly weapon, to wit: a firearm, attempt to take from the person or presence of Luther Ray Broome, by means of force or intimidation goods or monies from Jordan's Hot Spot, located on Jonesville-Lockhart Highway in Union, South Carolina in violation of Section 16-11-330(B), Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

/s/ T E Pope
SOLICITOR

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF UNION)

At a Court of General Sessions, convened on May 15, 1997, the Grand Jury of Union County present upon their oath:

CRIMINAL CONSPIRACY

That Wesley Aaron Shafer did in Union County on or about April 13, 1997, wilfully and unlawfully unite, combine, conspire, confederate, agree and have tacit understanding with Joseph Adam Mullinax, Justin Matthew Porter, and/or other persons whose names are unknown to these Grand Jurors, for the purpose of committing the Armed Robbery and/or Murder of one Luther Ray

Broome, all in violation of Section 16-17-410 of the Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

/s/ T E Pope
SOLICITOR

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF UNION	)	

STATE OF SOUTH CAROLINA	)	NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND STATUTORY AGGRAVATING CIRCUMSTANCES
vs.	)	
WESLEY AARON SHAFER,	)	
Defendant.	)	(Filed May 20, 1997)

Pursuant to Section 16-3-26(A) of the Code of Laws of South Carolina (1976, as amended), take notice that the State of South Carolina intends to seek the death penalty in the above captioned case wherein the Defendant, Wesley Aaron Shafer, is charged with Murder.

The State of South Carolina pursuant to Section 16-3-20(B) of the Code of Laws of South Carolina (1976, as amended) hereby gives notice of the following aggravating circumstances:

the Murder was committed while in the commission of:

(1) robbery while armed with a deadly weapon 16-3-20(C)(a)(1)(d)

(2) larceny with use of a deadly weapon 16-3-20(C)(a)(1)(e)

5/20, 1997
Union, South Carolina

/s/ T E Pope
Thomas E. Pope, Solicitor
Sixteenth Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT

THE STATE	)	NOTICE OF EVIDENCE IN AGGRAVATION OF THE PUNISHMENT
V.	)	
WESLEY AARON SHAFER,	)	Indictment # 97-GS44-419, 420, 421
Defendant.	)	(Filed Nov. 5, 1997)

TO: WESLEY AARON SHAFER AND HIS ATTORNEYS OF RECORD, WILLIAM ALL, ESQ. AND LEON BANKS, ESQ.:

PLEASE TAKE NOTICE pursuant to Section 16-3-20(B) of the Code of Laws of South Carolina (1976, as amended), that during the guilt phase or during any sentencing proceeding conducted in the above-entitled

capital murder case to determine whether the Defendant Wesley Aaron Shafer, should be sentenced to death or life imprisonment, the State will seek to introduce as evidence in aggravation of the punishment to be imposed upon the Defendant the evidence as listed herein below:

(1) The murder was committed while in the commission of the crime of armed robbery. Code of Laws of South Carolina, (1976, as amended), Section 16-3-20 (C)(a)(1)(d).

(2) The murder was committed while in the commission of the crime of larceny with use of a deadly weapon. Code of Laws of South Carolina (1976, as amended), Section 16-3-20(C)(a)(1)(e).

The State will further present as evidence in the second or sentencing trial all items of evidence, testimony and exhibits that were admitted during the first or guilt phase.

The State will present any and all evidence relating to prior bad acts and other evidence relating to the Defendant's character occurring at any time prior to the conclusion of the case. This shall include evidence as to the Defendant's adult and juvenile character, mentality, background, prior and subsequent adult and juvenile acts of violence, adult and juvenile crimes and sentences, and other unlawful conduct, prior and subsequent adult and juvenile violations of laws, rules, regulations and/or ordinances, prior and subsequent criminal adult and juvenile records and sentences, the nature and impact of said crimes, propensity to commit or attempt to commit acts of violence or bodily harm as an adult and a juvenile, propensity for violence and unlawful conduct as an adult and a juvenile, disregard for peace and good order as an

adult and a juvenile, and other similar characteristics of Wesley Aaron Shafer, as an adult and a juvenile, by the testimony of victims, witnesses, police officers, statements by the defendant and other relevant testimony, photographs and exhibits. *Lockett v. Ohio*, 438 U.S. 586 (1978); *State v. Shaw*. 255 S.E.2d 799 (1979).

The State will further present evidence of circumstances surrounding the crimes herein and the characteristics of Wesley Aaron Shafer, who committed the crimes. Evidence will also be presented to show the cause and/or manner in which the murder and crimes were committed, including, but not limited to, photographs, videotapes, other tapes, diagrams of the crime scene and victims, and testimony related thereto, including statements by the Defendant. *State v Goolsby*, 268 S.E.2d 31 (1980); *State v. Shaw, supra*.

The State will further present evidence, testimony and exhibits as to the Defendant's character and conduct while incarcerated in jails and/or prisons as an adult and a juvenile and disciplinary actions; disregard and violations of rules, regulations, laws and/or ordinances as an adult and a juvenile and disciplinary actions; disrespectful, disruptive and uncooperative actions and conduct as an adult and a juvenile; and all other such acts and conduct while incarcerated as an adult and a juvenile and disciplinary actions.

The State will further present evidence, testimony and exhibits as to the Defendant's character, statements and conduct relating to his release or parole from jails

and/or prisons as an adult and a juvenile and probationary status; mental or physical evaluations of the Defendant as an adult and a juvenile; opinions as to the Defendant's character, propensity for violence and unlawful conduct, disregard for peace and good order and to commit such acts in the future.

The State will further present detailed evidence of circumstances surrounding the arrest and apprehension of Wesley Aaron Shafer, including but not limited to weapons, photographs, recordings, diagrams, exhibits, statements by the defendant and testimony related thereto.

The State will further present any and all evidence concerning "victim impact" evidence relating to Luther Ray Broome's personal characteristics and the emotional impact of the crimes on the family and friends of the victim, the consequences of the crimes on the family and friends of the victim and arguments relating thereto pursuant to *Payne v. Tennessee*, 111 S.Ct. 2597 (1991) and *State v. Rocheville*, 425 S.E.2d 32 (1993); *Lucas v. Evatt*, 416 S.E.2d 646 (1992); and *State v. Johnson*, 410 S.E.2d 547 (1991).

/s/ T E Pope
THOMAS E. POPE, SOLICITOR
SIXTEENTH JUDICIAL CIRCUIT

Union, South Carolina
November 5, 1997

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

[Caption Omitted In Printing]

Motions Hearing, Jan. 12, 1998

* * *

[99] **THE COURT:** YES, SIR. ALL RIGHT, LET'S GO AHEAD AND DO THAT WHILE WE ARE BACK HERE. I HAVE A FAIRLY STANDARD JUROR TYPE LIST THAT LISTS THREE TYPES OF JURORS. I WILL MAKE THIS COPY A COPY OF RECORD. I AM GOING TO PUT SIX IN THE JURY ROOM FOR THE JURORS TO REVIEW SO WHEN THEY COME OUT WE CAN DISCUSS IT. COUNSEL FOR THE DEFENDANT, AS I UNDERSTAND IT, DOES NOT OBJECT, AS I UNDERSTAND IT, TO THE EXHIBIT PER SE, BUT RATHER TO THE LANGUAGE IN THE LAST BASICALLY TWO SENTENCES. ONE IS A VERY, VERY LONG SENTENCE.

WE HAVE HEARD THE POSITION OF THE DEFENSE AND THE [100] STATE ADDING THE WORDS AT THE BOTTOM INSTEAD OF LIFE IMPRISONMENT, LIFE IMPRISONMENT WITHOUT PAROLE. AND WHAT WAS THE OTHER THING YOU WANTED TO PUT IN?

MR. BANKS: THAT'S ALL.

THE COURT: I'M JUST TRYING TO MAKE SURE.

MR. BANKS: YES, SIR, THAT'S CORRECT. AND, YOUR HONOR, SINCE THIS IS A CAPITAL CASE, WE NEED TO PUT ON THE RECORD THE BASES FOR

ALL OF OUR OBJECTIONS. MY FEELING IS THAT THIS CHARACTERIZATION OF THE THREE TYPE OF JURORS FOR PURPOSES OF VOIR DIRE WERE FAIRLY STANDARD BOILER PLATE LANGUAGE PRIOR TO THE CHANGE IN THE STATUTE REGARDING LIFE WITHOUT PAROLE, AND THERE HAS BEEN NO CHANGE IN THOSE TYPE OF JURORS SUBSEQUENT TO THE STATUTE THAT ALLOWS LIFE WITHOUT PAROLE. AND BECAUSE THE THIRD TYPE OF JUROR IS TOLD AGGRAVATORS AND MITIGATORS AND THAT YOU MAY FIND AGGRAVATORS OR YOU MAY FIND MITIGATORS, YOU MAY CONSIDER THOSE, IT SEEMS TO ME THE LAW IS UNDER THE STATUTE THAT THERE IS A POSSIBILITY OF LIFE WITHOUT PAROLE, AND THAT IS A DIFFERENT ISSUE THAN LIFE MEANS LIFE BECAUSE YOU'RE TRYING TO IDENTIFY JURORS FOR PURPOSES AT [sic] VOIR DIRE FOR BIAS AND PREJUDICE, AND TO IDENTIFY THE JURORS AS INFLEXIBLE AS TO THE DEATH PENALTY OR INFLEXIBLE AS TO LIFE, I THINK IT IS ONLY PROPER TO EXPLAIN TO THEM ALL OF THE OPTIONS THAT THEY MAY END UP WITH, DEPENDING ON THE OUTCOME OF THE CASE. AND IT WOULD BE IMPROPER FOR PURPOSES OF VOIR DIRE TO LIMIT THAT TO LIFE OR [101] DEATH.

SO, MY SPECIFIC REQUEST WAS THAT THE LAST SENTENCE READ LIFE IMPRISONMENT, COMMA, LIFE WITHOUT PAROLE, COMMA, OR THE IMPOSITION OF THE DEATH PENALTY.

THE COURT: ANYTHING, MR. SOLICITOR?

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, THIS PARTICULAR QUESTIONNAIRE HAS BEEN USED – THE DEFENSE IS TALKING ABOUT THE CHANGE IN THE STATUTE, BUT I THINK THE ISSUE OF WHETHER OR NOT LIFE IS WITHOUT PAROLE OR WHAT SHOULD BE TOLD TO THE JURY IN THAT REGARD SHOULD BE HANDLED AT THE CLOSE OF THE CASE PER THE JUDGE'S INSTRUCTIONS. IT WOULD PARTIALLY BE BASED ON SIMMONS, AND WHETHER OR NOT THEY MADE A DANGEROUS ARGUMENT, AND BASED ON THAT I WOULD REQUEST THAT YOU USE THE QUESTIONNAIRE THAT HAS BEEN USED IN THE PAST.

THE COURT: MY RESPONSE TO THAT IS, THAT IS LIMITED TO THE 12 THAT'S GOING TO DECIDE. THE PURPOSE OF THOSE THREE PARAGRAPHS IS FOR VOIR DIRE FOR THEM TO DISTINGUISH WHAT THEY CAN OR CAN'T DO.

MR. BANKS: I THINK IT IS VERY CLEAR FROM PAST HISTORY IN DEATH PENALTY CASES, IN CAPITAL CASES, THAT THE QUESTION OF WHETHER YOU CAN GET LIFE WITHOUT PAROLE IS RELEVANT FOR THE VOIR DIRE. SOMEBODY THAT MAY CAN'T GIVE THE DEATH PENALTY, WHO WOULD OTHERWISE BE DISQUALIFIED, MAY HAVE A DIFFERENT OPINION IN VIEW OF LIFE WITHOUT PAROLE. AND THAT'S THE PURPOSE FOR BEING ABLE TO IDENTIFY THOSE AT ALL.

[102] **THE COURT:** I'M GOING TO SUBMIT IT AS IT IS DRAFTED.

* * *

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSION
SIXTEENTH JUDICIAL CIRCUIT

[Caption Omitted In Printing]

(EXHIBIT "B")

[MEMORANDUM FROM THE COURT
TO PROSPECTIVE JURORS, JAN. 12, 1998]

THERE IS A TYPE OF JUROR WHO, ONCE THE CRIME OF MURDER HAS BEEN PROVED BY THE STATE AND THE JUROR IS CONSIDERING PUNISHMENT, FEELS THAT HE OR SHE IS REQUIRED TO GIVE THE DEATH PENALTY IN EACH AND EVERY CASE. THIS JUROR SIMPLY FEELS THAT ONCE A MURDER HAS BEEN COMMITTED, THE DEATH PENALTY IS THE MOST APPROPRIATE PUNISHMENT NO MATTER WHAT THE CIRCUMSTANCES OF THE CASE.

THE SECOND TYPE OF JUROR IS ONE WHO, ALTHOUGH THE GUILT OF THE DEFENDANT HAS BEEN DETERMINED, UNDER NO CIRCUMSTANCES COULD EVER GIVE THE DEATH PENALTY. THIS JUROR WOULD NOT NEED TO HEAR WHAT THE FACTS AND CIRCUMSTANCES IN AGGRAVATION IN THIS PARTICULAR CASE WERE BECAUSE THE JUROR WOULD HAVE HIS OR HER MIND MADE UP CONCERNING PUNISHMENT NO MATTER WHAT HE OR SHE HEARD.

THE THIRD TYPE OF JUROR IS ONE WHO, ALTHOUGH THE GUILT OF THE DEFENDANT HAS BEEN DETERMINED, WOULD NOT HAVE HIS OR HER

MIND MADE UP IN ADVANCE CONCERNING PUNISHMENT. THIS JUROR WOULD NEED TO HEAR THE FACTS AND CIRCUMSTANCES IN AGGRAVATION AND IN MITIGATION, AND WOULD WANT TO LISTEN TO AND FOLLOW THE LAW AS THE JUDGE CHARGES THE JURY, BEFORE HE OR SHE COULD MAKE THE DECISION REGARDING PUNISHMENT, AND IF THE FACTS PRESENTED SO WARRANTED, THIS JUROR COULD BRING IN A VERDICT OF LIFE IMPRISONMENT. ALSO, IF THE FACTS PRESENTED SO WARRANTED, THE JUROR COULD BRING IN A VERDICT FOR THE DEATH PENALTY.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

[Caption Omitted In Printing]

TRIAL TRANSCRIPT

MARSHALL OWINGS – DIRECT BY MR. BRACKETT

* * *

[962] **MR. BRACKETT:** YOUR HONOR, AT THIS TIME I WOULD [963] LIKE TO PUBLISH THE FIRST PORTION OF THIS TAPE, AND I'LL PLAY IT THROUGH THE ENTIRE TAPE.

THE COURT: YOU MAY PROCEED.

(THE VIDEO TAPE WAS SHOWN TO THE JURY)

* * *

[965] **MR. BRACKETT:** YOUR HONOR, AT THIS TIME I WOULD PROCEED TO PUBLISH THE OTHER HALF OF THE VIDEO.

THE COURT: YES, SIR.

(THE VIDEO WAS PLAYED FOR THE JURY)

* * *

MONICA INMAN – DIRECT BY MR. POPE

[1032] A. IT WAS A BLACK FEMALE; I DIDN'T KNOW HER.

Q. AND WHAT DID YOU DO THEN; WHERE WAS JAMIE AT THAT POINT?

A. JAMIE WAS STILL IN THE STORE. WHEN I LOOKED UP, AND NOTICED THEY WASN'T THERE, ME AND JENNIFER GOT OUT OF THE CAR. THE BLACK GIRL WAS GETTING OUT OF HER CAR AND GOING IN THE STORE. I JUST REMEMBER ASKING HER OR TELLING HER THAT SOMETHING WAS WRONG, NOT TO GO IN THE STORE. ANYWAY, WE ALL WENT IN THE STORE. JAMIE WAS ON THE PHONE AT THIS TIME.

Q. TELL THE JURY WHAT YOU SAW WHEN YOU ENTERED THE STORE.

A. WHEN I ENTERED THE STORE, JAMIE WAS ON THE PHONE CRYING. I LOOKED OVER THE COUNTER AND SEEN RAY BROOME ON THE FLOOR.

Q. AND AT THAT POINT, WHAT DID YOU DO THEN?

A. I LOOKED OVER THE COUNTER AND THEN I LIKE JUMPED BACK.

AND JENNIFER WAS UPSET, AND I TOLD JENNIFER NOT TO LOOK, AND THEN WE WENT OUTSIDE, GOT IN THE CAR AND RODE DOWN THE ROAD TO TRY TO GET HELP OR SOMETHING BECAUSE AT THE TIME IT DIDN'T DAWN ON US – WE KNEW JAMIE WAS ON THE PHONE, BUT WE WERE REALLY NERVOUS AND UPSET.

* * *

[1178] **JOSEPH ADAM MULLINAX – DIRECT BY MR. BRACKETT**

* * *

Q. ADAM, HAVE ANY PROMISES BEEN MADE TO YOU?

A. NO, SIR.

Q. REGARDING YOUR PENDING CHARGES?

A. NO, SIR, THEY HAVE NOT.

Q. ANY DEALS OF ANY SORT WHATSOEVER?

A. NONE WHATSOEVER.

Q. BY ANY LAW ENFORCEMENT AGENCY AT ALL INVOLVING THIS CASE, INCLUDING THE SOLICITOR'S OFFICE?

MR. BANKS: YOUR HONOR, ASKED AND ANSWERED.

THE COURT: I SUSTAIN THE OBJECTION.

Q. WHY ARE YOU TESTIFYING, ADAM?

A. THE REASON I'M TESTIFYING –

MR. BANKS: OBJECTION TO THE RELEVANCE, YOUR HONOR.

THE COURT: I SUSTAIN THE OBJECTION.

MR. POPE: YOUR HONOR, COULD WE APPROACH ON A MATTER OF LAW?

THE COURT: WELL, LET'S LET THE JURY GO OUT.

IN CAMERA:

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR?

[1179] **THE COURT:** YES, SIR, EXCEPT I BELIEVE THIS IS MR. BRACKETT'S WITNESS.

MR. POPE: YES, SIR.

THE COURT: BUT I'LL BE GLAD TO HEAR FROM YOU, NOBODY IS OBJECTING.

MR. POPE: YOUR HONOR, THE OBJECTION IS THAT HIS CREDIBILITY IS NOT IN ISSUE. ANY TIME A WITNESS TAKES THE STAND – IF THAT IS THE CASE, THEN HE WOULDN'T QUESTION HIS CREDIBILITY, AND THAT'S CERTAINLY NOT THE CASE.

THE COURT: CREDIBILITY IS AN ISSUE, BUT YOU'RE ASKING WHY HE IS TESTIFYING.

MR. POPE: YES, SIR. THAT IS CLEARLY RELEVANT FOR THE JURY'S UNDERSTANDING OF HOW TO TAKE HIS TESTIMONY. WHY IS HE HERE TODAY? BECAUSE IT IS ALREADY CLEAR ON THE RECORD THAT HE IS A CO-DEFENDANT, AND HAS BEEN CHARGED, AND THEY'RE GOING TO SAY WELL THERE'S GOT TO BE SOME REASON HE'S HERE. I THINK CLEARLY IT'S ADMISSIBLE FOR HIS CREDIBILITY TO TELL THE JURY WHY HE HAS DECIDED TO COME FORWARD, YOUR HONOR.

THE COURT: MR. BANKS? OR WHOEVER IS APPROPRIATE.

MR. BANKS: THANK YOU, YOUR HONOR. YOUR HONOR, THERE IS NOT ANY CREDIBILITY IN ISSUE UNTIL SOME TYPE OF IMPEACHMENT. THIS WITNESS IS TESTIFYING UNDER OATH. HIS CREDIBILITY IS WHATEVER THE JURY ASSUMES IT TO BE. THEY ARE CERTAINLY VERY PROPER QUESTIONS FOR REDIRECT, BUT AT THIS POINT – I MEAN THAT'S LIKE ASKING HIM TO –

[1180] **THE COURT:** IT'S LIKE TRYING TO BOLSTER THE WITNESS BEFORE HIS CREDIBILITY IS EVEN IMPEACHED.

MR. BANKS: YES, SIR.

THE COURT: WHAT IF YOU ASKED THIS QUESTION, AND HE WERE NOT TO ASK ANY QUESTIONS AT ALL?

MR. BRACKETT: YOUR HONOR, I'VE ALWAYS PROCEEDED UNDER THE ASSUMPTION THAT YOU CAN – I'VE NEVER ENCOUNTERED THIS OBJECTION BEFORE. I AM RESPONSIBLE FOR THIS WITNESS' CREDIBILITY. BY CALLING HIM TO THE STAND, I VOUCHED FOR HIS CREDIBILITY. AND I HAVE TO ESTABLISH, AND HELP ESTABLISH HIS CREDIBILITY TO THIS JURY, AND I DO THAT BY ASKING HIM QUESTIONS, AND I SUBMIT THE PREVIOUS QUESTION REGARDING WHY HE –

THE COURT: WELL, IF YOU VOUCHED FOR HIS CREDIBILITY BY CALLING HIM, WHY DO YOU HAVE TO PROVE IT?

THE COURT: WELL, YOUR HONOR, THAT'S A TECHNICAL TERM FOR IT; I HAVE TO PROVE

EVERYTHING TO THIS JURY; THAT'S MY DUTY, IT'S MY BURDEN, INCLUDING HIS CREDIBILITY. I HAVE TO PROVE TO THIS JURY THAT WHAT HE IS SAYING IS BELIEVABLE, AND PRESENT EVIDENCE TO THEM, ANY RELEVANT EVIDENCE THAT IS PROBATIVE ON THE ISSUE OF HIS CREDIBILITY, INCLUDING THE EXISTENCE OR NON-EXISTENCE OF ANY DEALS.

THE COURT: YOU'VE ALREADY ASKED HIM ABOUT THAT.

MR. BRACKETT: YES, SIR. AND RIGHT ON THE HEELS OF THE QUESTION ABOUT A DEAL, IS THE NEXT MOST OBVIOUS QUESTION [1181] IF YOU'RE CHARGED WITH A CAPITAL MURDER OR IF YOU ARE CHARGED WITH A CRIME THAT HAS THE POTENTIAL –

THE COURT: DID I MISS SOMETHING? IS HE CHARGED WITH A CAPITAL MURDER?

MR. BRACKETT: HE IS CHARGED WITH A POTENTIAL CAPITAL MURDER; THERE IS NO CAPITAL MURDER CHARGE PENDING AGAINST HIM, HE'S CHARGED WITH MURDER. BUT IF YOU'RE CHARGED WITH MURDER, THEN THE OBVIOUS QUESTION THAT EXISTS IN THE MINDS OF EVERYONE OF THESE JURORS IS WHY IS HE UP HERE TESTIFYING. IF HE HASN'T BEEN GIVEN A DEAL, WHAT IS THE REASON THAT ADAM MULLINAX HAS CHOSEN TO COME INTO COURT AND TESTIFY AGAINST HIS RELATIVE IN REGARDS TO THIS CASE. I THINK IT'S PROPER FOR ME TO BRING THAT OUT IN ORDER FOR THEM TO PROPERLY UNDERSTAND, AND EVALUATE

HIS CREDIBILITY, AND THE TESTIMONY HE HAS GIVEN.

THE COURT: MR. BANKS, ANYTHING FURTHER?

MR. BANKS: YES, YOUR HONOR. I WOULD ONLY SAY THE ONLY REASON HIS CREDIBILITY WOULDN'T BE ACCEPTED BY THE JURY IS BECAUSE HE IS CHARGED WITH MURDER, ARMED ROBBERY AND CONSPIRACY, WHICH THEY HAVE CHARGED HIM WITH. THEY HAVE PLACED HIS CREDIBILITY IN ISSUE BY THE CHARGE, AND NOW THEY ARE TRYING WITH THE SAME WITNESS TO BOLSTER IT, TO SAY HE'S STILL OKAY, HE'S STILL CREDIBLE. AND UNTIL WE ASK QUESTIONS ON THAT, IT ISN'T RELEVANT.

THE COURT: I SUSTAIN THE OBJECTION. IF THEY GO [1182] INTO IT ON CROSS, YOU CAN CERTAINLY GO INTO IT ON REDIRECT.

MR. BRACKETT: ALL RIGHT. WHILE THE JURY IS OUT, I WOULD LIKE TO ADDRESS ONE OTHER ISSUE REGARDING THIS WITNESS' TESTIMONY BECAUSE I AM DONE IF I'M NOT ALLOWED TO ASK HIM THAT QUESTION, BUT I ANTICIPATE IMPEACHMENT, AND THIS IS A MOTION IN LIMINE BECAUSE THERE WOULD BE NO CURE ONCE THEY ASK THE IMPEACHING QUESTION, YOU'RE FACING LIFE IN PRISON WITHOUT PAROLE ON THE MURDER CHARGE. THAT EVIDENCE WOULD THEN BE TO THE JURY. THERE HAS BEEN NO TESTIMONY OF ANY DEAL. THERE HAS BEEN TESTIMONY, AS A MATTER OF FACT, AFFIRMATIVE TESTIMONY THAT THERE IS

NO DEAL, AND THEY ARE NOT ALLOWED TO EXPLORE AT RANDOM, BY WAY OF EXPLORING EDUCATING THE JURY AS TO THE NON-EXISTENCE OF PAROLE ELIGIBILITY DURING IMPEACHMENT ON CROSS EXAMINATION OF THIS WITNESS. AND I WOULD OBJECT IN LIMINE TO THEM DOING ANYTHING MORE THAN ASKING –

THE COURT: DO I UNDERSTAND THAT YOU'RE ASKING THEM TO NOT ASK A QUESTION THAT HAS A TRUE ANSWER JUST BECAUSE THE ANSWER MAY BE DETRIMENTAL TO YOUR POSITION?

MR. BRACKETT: NO, SIR. I'M SAYING THAT THEY ARE ENTITLED FIRST, AND I THINK THERE IS CASE LAW ON THIS POINT.

THE COURT: WELL, YOU BETTER FIND IT.

MR. BRACKETT: YES, SIR, I'LL LOOK FOR IT.

THE COURT: WELL, I DON'T KNOW WHEN YOU'RE GOING TO DO IT BECAUSE THE WITNESS IS ON THE STAND RIGHT NOW.

[1183] **MR. BRACKETT:** WELL, I WOULD ASK FOR A BREAK THEN TO FIND THAT.

THE COURT: YOU'RE GOING TO FIND ME SOME LAW THAT SAYS THAT THEY CAN'T GO INTO EVERYTHING HE'S FACING IN REGARD TO THIS SAME OFFENSE?

MR. BRACKETT: I'M SAYING THAT ONCE THEY HAVE ASKED HIM HAVE YOU BEEN PROMISED ANY DEALS OR MADE ANY PROMISES OF ANY

NATURE REGARDING YOUR PENDING CHARGES IN EXCHANGE FOR YOUR TESTIMONY HERE TODAY, THE MINUTE HE SAYS NO – THEY CAN ASK HIM, YOU HOPE FOR SOME LENIENCY, BUT THEY CANNOT GO INTO THE SPECIFICS OF THE POTENTIAL SENTENCE HE FACES ON THOSE CHARGES ONCE HE SAYS THERE IS NO DEAL. HE WOULD HAVE TO SAY YES, THERE IS A DEAL, AND THEN THE SENTENCE BECOMES RELEVANT; THEN THE SENTENCE THAT HE FACES BECOMES RELEVANT TO EXPLORE HIS CREDIBILITY, BECAUSE THEN IT BECOMES IMPORTANT TO THE JURY TO REALIZE WHAT HIS EXPOSURE IS, BUT IF THERE IS NO DEAL –

THE COURT: HOW LONG DO YOU NEED TO FIND THAT LAW?

MR. NETTLES: YOUR HONOR, I CAN GIVE YOU SOME LAW TO THE CONTRARY ON THAT. STATE VERSUS BROWN, 303 SOUTH CAROLINA 169, 1991; DAVIS VERSUS ALASKA, 415 U.S. 308; STATE VERSUS FARLAND, 279 SOUTH CAROLINA 327; AND STATE VERSUS COLLINS, 253 SOUTH CAROLINA '65.

THE COURT: LET ME SEE THEM. ALL RIGHT, WE WILL TAKE A BREAK AND YOU GET YOUR CASES, MR. NETTLES, AND MR. [1184] BRACKETT, YOU GET YOUR'S. [sic] I'M GOING TO LET YOU STEP DOWN, MR. MULLINAX. YOU CAN JUST GO BACK AND SIT WITH YOUR ATTORNEY. YOU'RE UNDER OATH, AND YOU'RE SUBJECT TO BEING CROSS EXAMINED, SO YOU CAN'T DISCUSS YOUR TESTIMONY. WELL, I TELL YOU WHAT. WHY DON'T YOU JUST HAVE A SEAT OVER THERE IN THE JURY

BOX FOR RIGHT NOW. IF YOU NEED TO GO TO THE REST ROOM OR SOMETHING, WE'LL HAVE SOMEBODY TO HELP YOU WITH THAT.

(AFTER THE BREAK)

THE COURT: YOU CAN COME UP HERE AND HAVE A SEAT. NOW, WHEN I LEFT THE ROOM THERE WAS A MOTION PENDING. I HAVE DONE SOME RESEARCH AND I HAVE ALSO TALKED TO COUNSEL. IT IS MY UNDERSTANDING THAT WE HAVE BASICALLY REACHED AN UNDERSTANDING THAT THE WITNESS MAY BE ASKED QUESTIONS CONCERNING THE CHARGES PENDING AGAINST HIM, BUT NOT AS TO ANY POTENTIAL PUNISHMENT TO THE EXTENT IT WOULD INCLUDE OR EXCLUDE PAROLE ELIGIBILITY. IS THAT CORRECT?

MR. BRACKETT: YES, SIR.

THE COURT: IS THAT CORRECT?

MR. BANKS: YES, SIR.

THE COURT: ALL RIGHT, BRING IN THE JURY.

IN THE PRESENCE OF THE JURY:

THE COURT: MR. BRACKETT?

MR. BRACKETT: YOUR HONOR, THAT'S ALL THE QUESTIONS I HAVE OF THIS WITNESS.

THE COURT: MR. NETTLES?

[1185] **MR. NETTLES:** WE HAVE NO QUESTIONS OF THIS WITNESS, YOUR HONOR.

* * *

[1240] **JENNIFER MARTIN – CROSS BY MR. POPE**

* * *

Q. IF I COULD STOP YOU JUST A SECOND. YOU'RE STILL IN THE BACK SEAT OF THE CAR AND YOU'RE PULLED UP TO THE FRONT OF THE STORE; IS THAT RIGHT?

A. UH HUH.

Q. AND YOU'RE LOOKING AND YOU SEE JAMIE PALMER'S FACE TURNED BACK TOWARDS YOU; IS THAT RIGHT?

A. YES.

Q. AND THEN TELL THE JURY WHAT HAPPENED?

A. I BELIEVE, IF I'M NOT MISTAKEN, I BELIEVE SHE PICKED THE PHONE UP AND WE RAN IN THERE TO GET HER, YOU KNOW, TO REALLY SEE WHAT HAD HAPPENED. I'M TRYING TO REMEMBER. ME AND MONICA, THE OTHER GIRL, RAN BACK OUT. WE WERE SCARED, AND WE WERE GOING TO GO AND TRY TO GET HELP OR WHATEVER. WE WERE JUST IN TOTAL SHOCK.

Q. JENNIFER, DID YOU KNOW RAY?

A. YES, I DID.

* * *

[1436] **THE COURT:** GOOD AFTERNOON. YESTERDAY, AS YOU RECALL, THE 12 OF YOU SITTING AS A TRIAL JURY IN THE GUILT PHASE OF THE TRIAL FOUND WESLEY AARON SHAFER GUILTY OF

THREE CHARGES, ONE OF WHICH WAS MURDER. IT IS NECESSARY, AS WE TOLD YOU SEVERAL TIMES, THAT THIS ADDITIONAL PROCEEDING WILL TAKE PLACE TO DETERMINE THE PUNISHMENT THAT THE COURT IS TO IMPOSE UPON MR. SHAFER IN REGARD TO THE MURDER CHARGE.

THE PURPOSE IS FOR YOU TO DETERMINE, BASED ON THE EVIDENCE, WHETHER OR NOT HE SHOULD BE SENTENCED TO DEATH OR LIFE IMPRISONMENT.

[1437] AS TO YOUR ROLE IN THIS MATTER, YOU WILL BE ASKED TO RECOMMEND TO THE COURT THE SENTENCE FOR THE DEFENDANT, WESLEY AARON SHAFER. DURING THIS PROCEEDING THE STATE AND THE DEFENDANT WILL HAVE AN OPPORTUNITY TO INTRODUCE ADDITIONAL EVIDENCE IN EXTENUATION, MITIGATION OR AGGRAVATION. BOTH SIDES WILL HAVE AN OPPORTUNITY TO PRESENT ARGUMENTS FOR AND AGAINST THE DEATH PENALTY.

THE QUESTION HERE IS SHOULD YOU RECOMMEND A SENTENCE OF LIFE IMPRISONMENT OR SHOULD YOU RECOMMEND A SENTENCE FOR DEATH.

AFTER YOU HAVE HEARD – THE ATTORNEYS WILL MAKE OPENING STATEMENTS TO YOU. THE PATTERN WILL BE VERY MUCH THE SAME AS IT WAS IN THE INITIAL GUILT PHASE. THE ATTORNEYS WILL MAKE FOR YOU OPENING STATEMENTS. AGAIN, THEY ARE STATEMENTS; THEY ARE NOT ARGUMENTS, AND THEY ARE NOT EVIDENCE.

AFTER YOU HAVE HEARD THE EVIDENCE, AND THE CLOSING ARGUMENTS OF THE ATTORNEYS, THE LAST ARGUMENTS OF THE ATTORNEYS, OR BETTER STATED, THE LAST ARGUMENT OF THE STATE AND THE LAST ARGUMENT ON BEHALF OF THE DEFENDANT, YOU WILL RETIRE AND DETERMINE THE SENTENCE THAT SHOULD BE RECOMMENDED TO THE COURT.

I HAVE USED THE WORD RECOMMEND; I TELL YOU NOW AND I WILL TELL YOU LATER THAT UNDER THE LAW WHATEVER YOU AS TRIAL JURY RECOMMEND, THE COURT IS REQUIRED TO IMPOSE.

* * *

[1438] **OPENING STATEMENT TO THE JURY BY MR. BRACKETT:**

MAY IT PLEASE THE COURT. GOOD AFTERNOON MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY. WE HAVE NOW REACHED THAT SECOND STAGE OF THE TRIAL. AS WE ENTER THIS STAGE, WESLEY SHAFER STANDS CONVICTED OF MURDER, ATTEMPTED ARMED ROBBERY, AND CRIMINAL CONSPIRACY BY THE RETURNING OF YOUR VERDICTS YESTERDAY. WE ARE NOW TO THAT STAGE WHERE WE CONSIDER THE PUNISHMENT.

FOR EVERY ACTION THAT ANYBODY TAKES ANYWHERE, THERE ARE CONSEQUENCES. THAT'S WHERE WE'RE AT NOW. WHAT ARE THE CONSEQUENCES OF THIS ACTION.

THE STATE, AS IN THE PREVIOUS PHASE OF THE TRIAL, THE STATE BEARS THE BURDEN OF PROVING

TO YOU WHAT ARE CALLED STATUTORY AGGRAVATING CIRCUMSTANCES. IN THIS PHASE OF THE TRIAL, AS IN THE PREVIOUS PHASE, THE DEFENSE BEARS NO BURDEN WHATSOEVER. IF THEY CHOOSE TO PUT ANYTHING UP, THEY CAN. IF THEY DON'T, THEY DON'T HAVE TO. THAT'S THEIR OPTION. THE STATE BEARS THE BURDEN OF PROVING TO YOU THAT THERE EXISTED DURING THE COMMISSION OF THIS MURDER A STATUTORY AGGRAVATING CIRCUMSTANCE, AT LEAST ONE.

IF THE 12 OF YOU FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE, THAT AUTHORIZES YOU THEN TO PROCEED AND DELIBERATE ON WHETHER [1439] OR NOT THE SENTENCE FOR THIS CRIME SHOULD BE LIFE IMPRISONMENT OR DEATH.

THE STATE HAS ALLEGED TWO STATUTORY AGGRAVATING CIRCUMSTANCES. THAT THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ARMED ROBBERY, AND THAT MEANS EXACTLY WHAT IT SAYS, THAT AN ARMED ROBBERY WAS IN PROGRESS, AND IT DOESN'T HAVE TO BE COMPLETED, BUT WHILE IT WAS IN PROGRESS, THIS DEFENDANT DID MURDER SOMEBODY. THAT'S THE FIRST STATUTORY AGGRAVATING CIRCUMSTANCE THAT WE HAVE ALLEGED.

THE SECOND IS, LARCENY WHILE IN THE POSSESSION OF A DEADLY WEAPON, WITH THE USE OF A DEADLY WEAPON.

LARCENY, THE JUDGE EXPLAINED TO YOU, IS THE TAKING OF SOMEBODY ELSE'S PROPERTY AND CARRYING IT AWAY WITH THE INTENT TO DEPRIVE THE OWNER PERMANENTLY OF THE USE THEREOF.

IN THIS PHASE WE ALSO WILL TELL YOU ABOUT OTHER POSSIBLE CONSEQUENCES. WE WILL TELL YOU ABOUT THE CONSEQUENCES, AND LADIES AND GENTLEMEN, THIS WILL BE ONE OF THE MOST PAINFUL TESTIMONY [sic] YOU WILL HAVE TO HEAR BECAUSE THE DEATH OF RAY BROOME IS LIKE AN EARTHQUAKE THAT SHATTERED HIS FAMILY OVER HERE, AND YOU WILL HEAR ABOUT WHAT HIS DEATH HAS DONE TO THEIR LIVES. AND THAT'S VERY, VERY DIFFICULT, AND WILL TEST EVERY EMOTIONAL RESOURCE THAT YOU HAVE.

FINALLY, WE WILL ALSO TELL YOU SOMETHING ABOUT THE DEFENDANT. WE WILL TELL YOU ABOUT HIS CHARACTER. WE WILL TELL YOU ABOUT HIM, HOW HE IS AND WHAT KIND OF PERSON HE IS.

[1440] THESE ARE ALL THINGS THAT YOU WILL HAVE TO CONSIDER WHEN YOU MAKE YOUR DECISION.

I SUBMIT TO YOU, LADIES AND GENTLEMEN, IF YOU LISTEN TO ALL OF THE EVIDENCE CAREFULLY, AT THE END OF THIS PHASE OF THE TRIAL, AND, OF COURSE, EVERYTHING THAT HAPPENED IN THE PREVIOUS PHASE, THAT'S NOT TO BE BLOTTED OUT, YOU CAN CONSIDER THAT AS WELL, ALL THE EVIDENCE THAT WE'VE ALREADY TALKED ABOUT, ALL THE EVIDENCE THAT'S ALREADY IN, YOU CAN

CONSIDER THAT IN MAKING YOUR DECISION, EXACTLY WHAT KIND OF CRIME THIS IS, AND AFTER CONSIDERING ALL OF THIS EVIDENCE, LADIES AND GENTLEMEN, I SUBMIT TO YOU YOUR VERDICT CAN ONLY BE ONE THING, THAT WESLEY SHAFER SHOULD BE SENTENCED TO DEATH FOR THIS TERRIBLE, TERRIBLE CRIME. THANK YOU VERY MUCH.

OPENING STATEMENT TO THE JURY BY MR. NETTLES:

WE OBVIOUSLY DIDN'T WANT TO BE HERE AT THIS PHASE OF THE CASE. I HOPE IT'S BEEN OBVIOUS TO YOU THAT WE HAVE TRIED VERY HARD TO BE GOOD LAWYERS AND PROVIDE WESLEY SHAFER WITH A VERY GOOD DEFENSE. WE DIDN'T WANT TO BE HERE. IT'S VERY SCARY, VERY SCARY BECAUSE AT THIS POINT WESLEY SHAFER'S LIFE, HE FACES JUST TWO ROADS, AND IT'S BECAUSE OF HIS OWN DOING. YOU HAVE FOUND HIM GUILTY OF MURDER; YOU HAVE FOUND HIM GUILTY OF CONSPIRACY; YOU HAVE FOUND HIM GUILTY OF ATTEMPTED ARMED ROBBERY. WE DON'T QUIBBLE WITH THAT. WE ACCEPT THAT; WE RESPECT YOUR VERDICT.

BUT AT THIS POINT IN WESLEY SHAFER'S LIFE, THERE [1441] ARE ONLY ONE OF TWO POSSIBLE VERDICTS, AND THAT IS LIFE IN PRISON, A 19 YEAR OLD CHILD OF GOD, OR DEATH.

* * *

AND YOU HAVE FOUND BY YOUR VERDICT THAT WESLEY SHAFER MADE THE DECISION TO KILL LUTHER RAY BROOME, AND HE MUST BE PUNISHED FOR THAT, AND HE WILL BE. BECAUSE IF IT ALL ENDED RIGHT NOW, WESLEY SHAFER WOULD SPEND THE REST OF HIS LIFE IN PRISON.

* * *

[1444] WE ASKED MOST OF YOU DURING VOIR DIRE WHEN WE WERE QUESTIONING YOU IF AT THE END OF THIS CASE IF WHEN THAT PEN COMES AROUND AND YOU ARE ASKED TO SIGN IT IF YOU WILL HAVE THE COURAGE TO SAY, NO, WE CAN PUNISH HIM, WE CAN PUNISH HIM HARD, WE CAN MAKE HIM SPEND THE REST OF HIS LIFE IN THE PRESENCE OF ONLY MEN, A 19 YEAR OLD, THAT BY THE END OF THIS CASE THERE WILL BE NO DOUBT IN YOUR MIND HE IS ONE OF THE LEAST OF GOD'S CHILDREN. THERE WILL BE NO DOUBT IN YOUR MIND THAT YOU CAN PUNISH HIM SEVERELY BY MAKING HIM SPEND THE REST OF HIS LIFE IN THE PRESENCE OF ONLY MEN, CONCRETE AND IRON, AND YOU WILL HAVE DONE YOUR JOB. AND YOU WILL BE PROUD THAT JUSTICE WOULD HAVE BEEN DONE.

AND THAT'S WHAT I'M GOING TO ASK YOU, TO PLEASE WAIT UNTIL YOU KNOW WESLEY SHAFER. AND WE'RE GOING TO GIVE YOU AN ABUNDANCE OF EVIDENCE TO ALLOW YOU TO KNOW WESLEY SHAFER. TO WAIT, AS WE ASK YOU, AND AS YOU

SWORE WHEN YOU TOOK YOUR VOIR DIRE, THAT YOU COULD WAIT UNTIL YOU'VE HEARD ALL OF THE EVIDENCE. THANK YOU.

THE COURT: CALL YOUR FIRST WITNESS.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, FIRST OF ALL WE WOULD LIKE TO INCORPORATE BY REFERENCE ALL PREVIOUS EVIDENCE AND EXHIBITS THAT WERE TENDERED IN THE FIRST STAGE OF THE CASE SO THAT I CAN REFERENCE THEM IN THIS PHASE.

[1445] **THE COURT:** ANYTHING FROM THE DEFENSE ON THAT? THE MOTION IS TO INCORPORATE THE EVIDENCE FROM THE PENALTY PHASE TO THE GUILT PHASE.

MR. NETTLES: WITHOUT OBJECTION.

THE COURT: GRANTED.

MR. POPE: NEXT, I WOULD HAVE MARKED AS STATE'S EXHIBIT 37 A CERTIFIED TRUE COPY OF MR. SHAFER'S DRIVING RECORD.

MR. NETTLES: WITHOUT OBJECTION.

THE COURT: IT IS RECEIVED WITHOUT OBJECTION.

MR. POPE: THE STATE WOULD CALL OFFICER JERRY HOFFMAN TO THE STAND.

JERRY HOFFMAN, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. POPE:

Q. OFFICER HOFFMAN, I'M GOING TO ASK YOU IF YOU WOULD, STATE YOUR NAME AND OCCUPATION FOR THE JURY PLEASE.

A. MY NAME IS JERRY HOFFMAN, AND I WORK FOR THE YORK COUNTY SHERIFF'S DEPARTMENT; I'M EMPLOYED THERE AS A DETECTIVE.

Q. COULD YOU TELL THE JURY HOW LONG YOU'VE BEEN IN LAW ENFORCEMENT?

A. I'VE BEEN IN LAW ENFORCEMENT JUST A TAD OVER 10 YEARS.

Q. WOULD YOU TELL US HOW LONG YOU'VE BEEN WITH THE SHERIFF'S DEPARTMENT?

[1446] A. I'VE BEEN WITH THE SHERIFF'S DEPARTMENT EIGHT AND A HALF OF THOSE YEARS.

Q. I'LL CALL YOUR ATTENTION BACK TO OCTOBER 9TH, 1995; DID YOU HAVE AN OPPORTUNITY TO PERFORM AN INVESTIGATION CONCERNING THE DEFENDANT IN THIS CASE, WESLEY SHAFER?

A. YES, I DID.

Q. WOULD YOU RELATE TO THE JURY WHAT TRANSPIRED, AND WHERE THE CASE WAS LOCATED?

A. THE CASE WAS LOCATED IN ROCK HILL, IN THE COUNTY'S JURISDICTION, AND BASICALLY WE

RECEIVED A REPORT THAT THERE WERE TWO YOUNG LADIES UNDER 12 YEARS OF AGE WHO HAD HAD SOME SEX CRIMES COMMITTED AGAINST THEM.

Q. SPECIFICALLY, WOULD YOU RELATE TO THE JURY WHAT THE FACTS AND CIRCUMSTANCES INVOLVED IN THE CASE WERE?

A. THESE TWO GIRLS STATED THAT THEY WERE OVER AT VENDOR'S GALLERY WHICH WAS A GAME ROOM TYPE THING AT THE OLD ROCK HILL MALL, AND THAT THEY HAD LEFT FROM THERE AND WENT TO A HOUSE THAT WAS ACROSS CHERRY ROAD ON FARGO STREET WITH SOME GUYS. AND THEY WERE THERE, AND AT SOME POINT IN TIME WERE ENGAGED IN SEXUAL ACTIVITIES INSIDE THAT HOME.

Q. WHEN YOU SAY GUYS, DID YOU MAKE A DETERMINATION OF HOW MANY?

A. YES, I DID.

Q. WOULD YOU RELATE THAT?

A. SIX.

[1447] Q. AND TWO 12 YEAR OLD GIRLS; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. DID YOU DETERMINE FROM YOUR INVESTIGATION HOW THEY GOT INTO THE TRAILER, THE MOBILE HOME?

A. WE DETERMINED AT ONE POINT THAT THERE WAS A WINDOW THAT WAS GONE THROUGH, AND THEN THE DOORS WERE USED.

Q. DID YOU DETERMINE OR FIND OUT IN YOUR INVESTIGATION ANYTHING AS FAR AS THE RELATIONSHIP BETWEEN THE VARIOUS MALES; DID THEY KNOW EACH OTHER OR WERE THEY RELATED IN ANY MANNER?

A. YES, THEY WERE. THEY WERE SUPPOSED TO BE MEMBERS OF A GANG KNOWN AS THE –

MR. NETTLES: OBJECTION.

THE COURT: I SUSTAIN THAT OBJECTION. DISREGARD THAT.

MR. NETTLES: I MOVE THAT THAT BE STRICKEN. I WOULD ASK THAT IT BE STRICKEN, YOUR HONOR.

THE COURT: DISREGARD THE HEARSAY EVIDENCE ABOUT A GANG, REGARDLESS OF WHAT ITS NAME MAY BE. JUST DISREGARD THAT.

Q. OFFICER HOFFMAN, AGAIN, FROM YOUR INTERVIEWS AND YOUR INVESTIGATION, WAS IT CLEAR THAT THEY KNEW EACH OTHER?

A. YES, SIR.

Q. AND ULTIMATELY AS PART OF YOUR INVESTIGATION DID YOU IN FACT INTERVIEW THE TWO 12 YEAR OLD GIRLS?

[1448] A. YES, SIR, I DID.

Q. AND WHEN YOU TELL THE JURY SEX ACTS, WOULD YOU RELATE SPECIFICALLY WHAT YOU ARE TALKING ABOUT?

A. SEXUAL INTERCOURSE AND ORAL SEX BY BOTH MALE AND FEMALE.

Q. AND IN PARTICULAR, DID YOU ULTIMATELY GAIN SUFFICIENT EVIDENCE THAT CHARGES WERE BROUGHT AGAINST WESLEY SHAFER?

A. YES, I DID.

Q. PARTICULARLY, THE CHARGE OF CRIMINAL SEXUAL CONDUCT WITH A MINOR SECOND DEGREE, AND BURGLARY SECOND DEGREE NON-VIOLENT; IS THAT CORRECT?

A. THAT WOULD BE CORRECT.

Q. I'LL SHOW YOU WHAT'S BEEN MARKED AS STATE'S EXHIBITS 38 AND 39 FOR IDENTIFICATION, AND ASK IF YOU WOULD TAKE THE TIME TO LOOK AT THAT AND TELL ME IF YOU CAN IDENTIFY IT?

A. YES, THESE ARE THE INDICTMENTS THAT CAME ABOUT FROM THESE CHARGES.

Q. AND WHAT ARE THE ATTACHMENTS, CAN YOU IDENTIFY THAT ALSO?

A. SENTENCING FORM.

Q. AND ONE IS ATTACHED TO EACH INDICTMENT?

A. THAT IS CORRECT.

Q. YOUR HONOR, THESE ARE ALSO TRUE COPIES FROM YORK COUNTY, THEY WOULD BE

STATE'S EXHIBITS 38 AND 39 FOR IDENTIFICATION, AND WE WOULD MOVE THEM INTO EVIDENCE.

[1449] **MR. NETTLES:** WITHOUT OBJECTION, YOUR HONOR.

THE COURT: THEY WILL BE RECEIVED.

(THE INDICTMENT FOR CRIMINAL SEXUAL CONDUCT WITH THE SENTENCING FORM WAS MARKED STATE'S EXHIBIT 38, AND THE INDICTMENT FOR BURGLARY SECOND DEGREE WITH THE SENTENCING FORM WAS MARKED IN EVIDENCE AS STATE'S EXHIBIT 39 WITHOUT OBJECTION.)

Q. OFFICER IF YOU COULD, BASED ON YOUR INVESTIGATION, RELATE TO THE JURY EXACTLY WHAT HAPPENED AS FAR AS THE FEMALES, AS FAR AS WHAT OCCURRED WITH THE VARIOUS MALES IN GOING ACROSS THE STREET, HOW IT TOOK PLACE.

A. AGAIN, AS I SAID, THEY WERE AT THE VENDOR'S GALLERY, AND THEY WERE TALKING WITH THESE GUYS AND SOME OF THEM ASKED IF THEY COULD GO ACROSS TO THIS HOME THAT WASN'T OCCUPIED, IT WAS A RENTAL HOUSE. THEY WENT ACROSS THERE, MADE THEIR WAY INTO THE HOME WHERE AT SOME POINT IN TIME THEY WERE ASKED ABOUT HAVING SEX, AND THEY DECLINED BUT AFTER CONTINUALLY ASKING AT SOME POINT IN TIME THEY DID ENGAGE IN SEX ACTS WITH THESE GUYS.

Q. OKAY. IN PARTICULARLY IN YOUR INVESTIGATION DID YOU HAVE AN OPPORTUNITY TO INTERVIEW WESLEY SHAFER?

A. YES, I DID.

Q. DID YOU TAKE A STATEMENT FROM HIM?

A. YES, I DID.

Q. I'LL CALL YOUR ATTENTION TO THE STATEMENT THAT REFERS TO [1450] OCTOBER 9TH, 1995, THE INCIDENT OF OCTOBER 9TH, IS THAT CORRECT?

A. YES, THE STATEMENT WOULD HAVE CONCERNED THAT INCIDENT ON OCTOBER 9TH.

Q. WOULD YOU RELATE TO THE JURY WHAT WAS TOLD TO YOU BY MR. SHAFER DURING YOUR INVESTIGATION?

A. I WAS TOLD BY MR. SHAFER THAT HE WAS AT THE VENDOR'S GALLERY AND THAT HE ENDED UP OVER THERE WITH THESE GIRLS. THAT AT ONE POINT IN TIME HIM AND ONE OF THE GIRLS HAD GONE TO A BEDROOM, AND THAT HE ASKED HER IF SHE SUCKED DICK AND SHE SAID YES; AND THEN HE TOLD HER, "SUCK MY DICK", AND SHE DID.

Q. I BEG THE COURT'S INDULGENCE?

THE COURT: YES, SIR.

(AFTER A BRIEF PAUSE)

Q. OFFICER, ANSWER ANY QUESTIONS THE DEFENSE MAY HAVE.

CROSS EXAMINATION BY

MR. NETTLES:

Q. OFFICER HOFFMAN, YOU INVESTIGATED THIS CASE; ISN'T THAT CORRECT?

A. YES, SIR.

Q. AND YOU FOLLOWED THIS CASE TO TRIAL?

A. SOME PLEA ARRANGEMENTS WERE MADE.

Q. AND PURSUANT TO THE PLEA ARRANGEMENTS, WESLEY SHAFER PLED; ISN'T THAT RIGHT?

[1451] A. YES, SIR, THAT'S CORRECT.

Q. AND YOU WERE ONE OF TWO INVESTIGATORS ON THIS CASE. ONE OF THEM WAS MR. CHISOLM?

A. THAT'S CORRECT.

Q. AND YOU SPOKE TO THE GIRLS?

A. YES, SIR, THAT'S CORRECT.

Q. AND AS A GOOD INVESTIGATOR, YOU INVESTIGATED THIS CASE THOROUGHLY, DIDN'T YOU?

A. YES, SIR.

Q. AND YOU DID A REPORT, CORRECT?

A. IF YOU'LL REFER TO A SPECIFIC REPORT. THERE ARE SEVERAL REPORTS.

Q. I'M REFERRING TO YOUR GENERAL SESSIONS CASE FILE CASE SUMMARY.

A. YES, SIR.

Q. AND DURING THAT INVESTIGATION, YOU FOUND A COUPLE OF THINGS OUT; DIDN'T YOU?

A. I FOUND SEVERAL THINGS OUT; YES SIR.

Q. ONE OF THEM YOU FOUND WAS THERE WAS NO FORCE USED?

A. YES, SIR.

Q. AND YOU FOUND THAT THE GIRLS HAD TOLD WESLEY THAT THEY WERE 15?

A. I BELIEVE THE STATEMENTS BY THE GIRLS WAS THAT ONE SAID THEY WERE 15, AND THE OTHER ONE CLAIMED TO BE 14.

Q. OKAY. AND THESE GIRLS WERE AT THIS VIDEO PLACE, RIGHT; [1452] A POOL PLACE?

A. A TEENAGE GAME ROOM.

Q. A TEENAGE GAME ROOM. AND THEY HADN'T TOLD THE TRUTH ABOUT THEIR AGE?

A. I GUESS NOT.

Q. THERE WAS NO FORCE USED?

A. THAT WOULD BE CORRECT.

Q. AND AS A MATTER OF FACT, YOU TOOK A FAIRLY LENGTHY STATEMENT FROM MS. ALLISON KEELER, I BELIEVE, ISN'T THAT RIGHT?

A. YES, SIR.

Q. AND IN THAT RATHER LENGTHY STATEMENT MS. KEELER TOLD YOU IN RATHER GRAPHIC DETAIL ABOUT WHAT WENT ON, DIDN'T SHE?

A. YES, SIR. I ASKED HER TO BE AS DETAILED AS SHE COULD BE.

Q. AND SHE – THERE WAS NO EVIDENCE OF ANY FORCE FROM HER STATEMENT, WAS THERE?

A. NO, SIR.

Q. AS A MATTER OF FACT, SHE CAME TO THE PLEA, AND WANTED TO MAKE IT CLEAR TO THE JUDGE THAT THERE WASN'T ANY FORCE; ISN'T THAT RIGHT?

A. I CAN'T REMEMBER IF SHE WAS AT THE PLEA OR NOT.

Q. ALL RIGHT. THANK YOU, SIR. THAT'S ALL THE QUESTIONS I HAVE.

THE COURT: ANYTHING FURTHER, SOLICITOR?

[1453] **REDIRECT EXAMINATION BY**

MR. POPE:

Q. OFFICER, YOU SAID THERE WAS ANOTHER 12 YEAR OLD?

A. THAT'S CORRECT.

Q. AND THE INDICATION – I UNDERSTAND THERE WAS NO FORCE. YOU DID INDICATE THERE WERE HOW MANY MALES WITH THESE TWO 12 YEAR OLDS?

A. THERE WERE AT LEAST SIX MALES THAT ACTUALLY ENGAGED IN SEX WITH THE TWO FEMALES.

Q. AND YOU ULTIMATELY BROUGHT THE CRIMINAL CHARGES OF BURGLARY AND CSC, AND THIS DEFENDANT DID PLEAD GUILTY?

A. THAT'S CORRECT.

MR. NETTLES: MAY I HAVE A FEW BRIEF QUESTIONS, YOUR HONOR?

THE COURT: YES.

RECROSS EXAMINATION BY

MR. NETTLES:

Q. NOW, EVEN AFTER THESE QUESTIONS, LET'S BE CLEAR, OKAY? YOU KNOW, WHILE THEY ARE TRYING TO COUCH THIS AS SIX MALES, AND TWO GIRLS, THERE WAS NO INDICATION OF ANY FORCE FROM ANY MALE, WAS IT?

A. NOT PHYSICAL FORCE. THERE WERE TIMES WHEN –

Q. LET ME ASK YOU THIS. WAS THERE ANY PHYSICAL FORCE?

MR. POPE: OBJECTION, YOUR HONOR. HE DIDN'T ALLOW HIM TO FINISH HIS ANSWER. HE SAID NOT PHYSICAL FORCE, BUT, AND HE BEGAN TO EXPLAIN.

[1454] **THE COURT:** BUT THAT WASN'T THE QUESTION.

Q. YOU DID A REPORT WHERE YOU SAID THERE WAS NO FORCE USED, RIGHT?

A. PHYSICAL FORCE.

Q. GO AHEAD THEN.

A. THERE WAS A TIME WHERE ONE OF THE GIRLS TOLD US THAT SHE FELT PRESSURED BECAUSE SHE KEPT BEING ASKED, AND ASKED, AND ASKED.

Q. NOW, THERE IS NO EVIDENCE THAT – DO YOU HAVE A COPY OF YOUR CASE FILE THERE WITH YOU?

A. I HAVE A COPY OF WHAT I BELIEVE YOU ARE HOLDING THERE IN YOUR HAND.

Q. DO YOU HAVE A COPY OF THE GENERAL SESSIONS CASE FILE FROM THE YORK COUNTY SHERIFF'S DEPARTMENT?

A. YES, SIR.

Q. IS THAT YOUR NAME AT THE TOP THERE, CHISOLM AND HOFFMAN?

A. YES, SIR.

Q. IS THAT THE INCIDENT REPORT?

A. IT WOULD BE.

Q. IS THAT INCIDENT TYPED IN THE UPPER RIGHT-HAND CORNER?

A. YES, SIR.

Q. IS THAT A LIST OF THE VICTIMS' NAMES?

A. YES, SIR.

Q. DOES IT LIST THE SUSPECTS NAMES?

[1455] A. YES, SIR.

Q. AND THEN YOU'VE GOT A CASE SUMMARY AT THE BOTTOM?

A. YES, SIR.

Q. YOU SAY NO FORCE, DON'T YOU? THE LAST SENTENCE?

A. YES, SIR.

Q. I HAVE NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT, YOU CAN STEP DOWN.

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MR. POPE: YOUR HONOR, MY DISCOVERY NOTEBOOK INDICATES THAT THEY HAVE RECEIVED A COPY OF THE INDICTMENT THAT INDICATED THAT IT WAS MARIJUANA. THEY RECEIVED A COPY OF THE WARRANT. THEY HAVE NOT RECEIVED A COPY OF THE ULTIMATE TEST.

THE COURT: WHAT DATE IS ON THE TEST?

MR. POPE: MAY 8TH OF 1997.

THE COURT: I SUSTAIN THE OBJECTION. BRING IN THE JURY.

MR. POPE: YOUR HONOR, IF IT PLEASE THE COURT, WE HAVE PREPARED A TRUE COPY OF THE INDICTMENT TO SHOW THAT THE CHARGE IS

PENDING. LIKE IN MAURICE HUGHES WHERE WE HAD COPIES CERTIFIED FROM CHARLOTTE BECAUSE AT THIS POINT THOSE DON'T HAVE TO BE PROVED BEYOND A REASONABLE DOUBT. IT'S JUST THAT THE INDICTMENT ALLEGES MARIJUANA.

[1459] **MR. BANKS:** I JUST WANT TO MAKE SURE THAT THE RECORD REFLECTS THAT I OBJECT, NOT TO THE PRESENCE OF THE DRUGS ON THE INDICTMENT, BUT THE TEST. WE CAN'T DEFEND WITHOUT THE TEST.

THE COURT: I SUSTAIN THE OBJECTION. YOU CAN ASK ABOUT A GREEN LEAFY SUBSTANCE BEING FOUND, AND THAT'S THE EXTENT OF IT. BRING IN THE JURY.

IN THE PRESENCE OF THE JURY:

THE COURT: THE JURY HAS RETURNED, YOU MAY PROCEED.

MICHAEL HAWKINS, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MS. MILLER:

Q. PLEASE STATE YOUR NAME FOR THE RECORD, AND SPELL YOUR LAST NAME.

A. MICHAEL HAWKINS, H-A-W-K-I-N-S.

Q. ON MAY 7TH, 1997, WHERE WERE YOU EMPLOYED?

A. I WAS EMPLOYED WITH THE UNION COUNTY SHERIFF'S OFFICE AS A JANITOR.

Q. AND ON THE MORNING OF MAY 7, 1997, CAN YOU TELL US WHAT, IF ANYTHING, UNUSUAL HAPPENED?

A. ACCORDING TO THE INCIDENT REPORT THAT I PREPARED THAT DAY, AT ABOUT 10:30 IN THE MORNING I WAS MAKING MY ROUNDS AT THE CITY JAIL WHICH IS WHERE WE WERE –

[1460] **THE COURT:** LET ME STOP YOU. I CAN'T HEAR YOU. COULD YOU JUST SPEAK A LITTLE LOUDER?

A. OKAY. ON THE MORNING OF THE 7TH AT ABOUT 10:30 I WAS MAKING MY ROUNDS WHICH WERE AT THE CITY JAIL, THE OLD JAIL, WHERE I NOTICED LIKE SMOKE AS WELL AS LIKE AN ODOR OF MARIJUANA THAT I THOUGHT –

MR. NETTLES: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION. LET THE JURY GO TO THE JURY ROOM.

IN CAMERA:

THE COURT: MR. HAWKINS, DID YOU NOT HEAR US DISCUSS AT LENGTH –

MR. POPE: COULD I BE HEARD ON THIS MATTER?

THE COURT: I KNOW HE JUST SAID HE SMELLED THE ODOR OF MARIJUANA.

MR. POPE: YES, SIR. AND IF IT PLEASE THE COURT, IF THIS IS BEING SUPPRESSED BECAUSE OF THE DISCOVERY ISSUE, I JUST WANT IT CLEAR ON THE RECORD, YOUR HONOR, THIS WITNESS CAN INDEPENDENTLY SMELL MARIJUANA WITHOUT AN EXPERT SAYING WHAT WAS ULTIMATELY RECOVERED WAS MARIJUANA. LIKEWISE, IF THE WHOLE ISSUE IS DISCOVERY, THE DEFENSE HAS CLEARLY BEEN ON NOTICE THAT THE DEFENDANT WAS CHARGED BECAUSE MR. ALL IS REPRESENTING HIM ON THESE CHARGES, THAT HE WAS CHARGED WITH HAVING MARIJUANA IN A JAIL CELL.

_I RESPECT THE COURT'S DECISION AS FAR AS BEING ABLE [1461] TO HAVE SOMEONE TO COME AND TESTIFY THAT THE MARIJUANA CIGARETTE THAT WAS RECOVERED WAS ULTIMATELY TESTED TO BE MARIJUANA, BUT NOTHING SHOULD PREVENT THIS OFFICER FROM TESTIFYING AS TO THAT, YOUR HONOR.

THE COURT: MR. BANKS?

MR. BANKS: YOUR HONOR, AT THE DISCOVERY CONFERENCE WE WERE TOLD BY A SOLICITOR THAT I KNOW YOU DON'T HAVE THE DRUG TEST, WE'LL GIVE IT TO YOU. THE REASON THAT WE ASKED THE QUESTION IS TO MAKE AN INDEPENDENT DETERMINATION OF WHETHER IT WAS MARIJUANA.

THIS IS A DEATH PENALTY CASE. WE HAVE GOT TO CHECK EVERY T AND EVERY I. AND THE COURT HAS RULED THAT WE DIDN'T GET THAT. SINCE WE

DIDN'T GET IT, ANY CONVERSATION OR ANY TESTIMONY OF THIS WITNESS AS TO IT BEING MARIJUANA IS IMPERMISSIBLE BECAUSE THE COURT'S ALREADY RULED IN THE ALTERNATIVE. THEY HAVEN'T LAID ANY FOUNDATION OR ANY KNOWLEDGE THAT THIS GUY KNOWS WHAT MARIJUANA SMOKE SMELLS LIKE.

THE COURT: I SUSTAIN THE OBJECTION. BRING IN THE JURY.

MR. BANKS: YOUR HONOR,WE WOULD MOVE FOR A MISTRIAL; IN THE ALTERNATIVE, WE WOULD MOVE FOR A DISMISSAL OF THE DEATH PENALTY NOTICE IN THE SENTENCING PHASE.

THE COURT: THOSE MOTIONS WILL BE DENIED. BRING IN THE JURY.

[1462] **MR. POPE:** JUST TO BE SURE I UNDERSTAND, IS SHE GOING TO BE ALLOWED TO LAY THAT FOUNDATION?

THE COURT: WE ARE NOT GOING TO GO INTO THAT IT WAS MARIJUANA. HE CAN TESTIFY THAT IT WAS A GREEN LEAFY SUBSTANCE.

IN THE PRESENCE OF THE JURY:

THE COURT: MEMBERS OF THE JURY, DISREGARD ANYTHING THAT WAS SAID ABOUT ANY TYPE OF ODOR THAT HE SMELLED AS FAR AS HIM DESIGNATING IT TO BE ASSOCIATED WITH ANY PARTICULAR DRUG. YOU MAY PROCEED.

CONTINUED DIRECT BY MS. MILLER:

Q. MR. HAWKINS, AT SOME POINT DID YOU APPROACH MR. SHAFER?

A. NOT AT THAT TIME I DIDN'T, NO.

Q. LATER DID YOU?

A. YES.

Q. PLEASE DESCRIBE THAT.

A. OKAY. AS I WAS SAYING, I SMELLED AN ODOR, AND I WENT BACK UP TO THE FRONT WHICH IS THE OFFICE AREA WHERE WE ANSWER THE PHONE, IT'S A LOBBY AREA. AND I CAN'T RECALL IF ANYONE - I MADE THE COMMENT TO SOMEBODY THAT I SMELLED SOMETHING, AND FOR THEM TO GO BACK AND SEE IF THEY COULD SMELL IT ALSO. I CAN'T REMEMBER IF ANYBODY WENT BACK THERE WITH ME, OR IF ANYBODY WENT BACK THERE. AT ANY RATE, I CONTACTED THE CITY -

Q. LET ME STOP YOU THERE. WE WILL MOVE FORWARD TO LATER IN [1463] THE DAY.

A. ALL RIGHT.

Q. AT APPROXIMATELY 5:30 -

THE COURT: LET ME JUST ASK YOU ONE THING. YOU SAID LATER IN THE DAY; WHEN DID THIS HAPPEN, I MISSED THE TIME.

Q. THIS WAS AT 10:30, YOUR HONOR.

THE COURT: HAS THAT BEEN TESTIFIED TO?

MS. MILLER: YES, YOUR HONOR.

THE COURT: ALL RIGHT, GO AHEAD.

Q. I'M SPEAKING ABOUT WHAT YOU DID, AND NOT WHAT ANYONE ELSE DID. IF YOU COULD STICK TO WHAT YOU DID.

A. ALL RIGHT.

Q. TELL US WHAT HAPPENED LATER IN THE DAY.

A. LATER IN THE DAY I CONTACTED CITY OFFICER ROBERT HINES WHO IS WITH THE CANINE UNIT.

Q. TELL US WHAT YOU DID WHEN YOU APPROACHED MR. SHAFER.

A. WELL -

Q. LATER THAT DAY AT 5:30 -

MR. BANKS: I OBJECT TO THE LEADING.

THE COURT: I SUSTAIN THE OBJECTION.

A. AT 5:30, LIKE I SAID, I HAD CALLED ROBERT HINES AND ASKED IF HE WOULD COME -

MR. BANKS: OBJECTION, NOT RESPONSIVE TO THE QUESTION.

[1464] **THE COURT:** I THINK HE HAS JUST SORT OF REFRESHED WHERE HE WAS IN HIS TESTIMONY. GO AHEAD.

Q. WHAT DID YOU DO AT 5:30?

A. OKAY. AT 5:30 I WENT TO THE CELL BLOCK FOR A CELL SEARCH OF MR. SHAFER'S CELL. FOR A CELL SEARCH YOU HAVE TO BRING THE SUBJECT OUT, SEARCH THE ENTIRE CELL, AND MAKE SURE THERE IS NO CONTRABAND OR WHAT-HAVE-YOU IN THERE. AT THAT TIME –

Q. DID YOU BRING HIM OUT OF HIS CELL?

A. YES, MA'AM.

Q. TELL US WHAT HAPPENED NEXT.

A. WE WERE IN THE HALL AREA WHICH WAS PROBABLY ABOUT THREE FOOT WIDE, AND I HAD HIM STAND AGAINST THE WALL, AND WHEN HE CAME OUT OF THE CELL HE HAD A DECK OF CARDS IN HIS HANDS. I ASKED MR. SHAFER IF I COULD SEE THE DECK OF CARDS, AND HE HANDED THEM TO ME. I OPENED THE DECK, PULLED OUT THE CARDS, AND A HOMEMADE CIGARETTE FELL ON THE FLOOR. AND AT THAT TIME I PROCEEDED WITH MY SEARCH OF THE CELL, AND FOUND A LIGHTER ALSO. AT THAT TIME I PROCEEDED TO GO UP FRONT AND PUT THE LIGHTER AND THE DECK OF CARDS, AND THE HOMEMADE CIGARETTES IN A BAG AND STAPLED THEM SHUT.

Q. OKAY, PLEASE ANSWER ANY QUESTIONS THEY MAY HAVE FOR YOU.

MR. BANKS: NO QUESTIONS, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN, AND YOU CAN BE [1465] EXCUSED. THANK YOU.

MR. BANKS: WE HAVE A BRIEF MATTER TO TAKE UP OUTSIDE THE PRESENCE OF THE JURY, YOUR HONOR.

THE COURT: ALL RIGHT, I'LL LET YOU GO BACK OUT FOR JUST A MOMENT.

IN CAMERA:

THE COURT: YES, SIR?

MR. BANKS: YOUR HONOR, WE WOULD MOVE AT THIS TIME TO STRIKE THE ENTIRE TESTIMONY OF THIS WITNESS ON TWO GROUNDS. ONE, THERE HAS BEEN NO QUESTIONS AT ALL OF THIS WITNESS AS TO THE SUBSEQUENT CHARGES THAT WOULD BE RELEVANT TO PENDING CHARGES FOR AGGRAVATION.

AND PURSUANT TO YOUR PREVIOUS RULING ON THE MARIJUANA, THERE IS NOW NO FOUNDATION FROM THIS WITNESS AT ALL THAT THE PRESENCE OF SMOKE, A LIGHTER, OR A HANDMADE CIGARETTE IS AGAINST ANY RULE OF THE DETENTION CENTER SUCH AS WOULD GO TO ANY AGGRAVATION OR ANYTHING WRONG. IT'S NOT AGAINST THE LAW TO HAVE A LIGHTER OR A CIGARETTE AT THIS POINT IN THE TRIAL. THEREFORE, IT WOULD NOT BE RELEVANT AS AN AGGRAVATOR. WE MOVE TO STRIKE THE ENTIRE TESTIMONY.

MS. MILLER: THE NEXT WITNESS I WAS GOING TO CALL WAS GOING TO TELL US ABOUT THE RULES OF THE JAIL AT THAT TIME.

THE COURT: I'M GOING TO RESERVE MY RULING SUBJECT TO IT BEING CONNECTED UP. I

REMEMBER THE WITNESS USED THE [1466] WORD CONTRABAND, BUT I CAN'T REMEMBER THE CONTEXT IN WHICH HE USED IT EXCEPT HE SAID THEY WERE SEARCHING FOR CONTRABAND. I'M GOING TO RESERVE A RULING ON THAT, SUBJECT TO IT BEING CONNECTED UP. BRING IN THE JURY.

IN THE PRESENCE OF THE JURY:

THE COURT: CALL YOUR NEXT WITNESS.

MS. MILLER: THE STATE CALLS DeANNE McFALLS.

DeANNE McFALLS, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MS. MILLER:

Q. PLEASE STATE YOUR NAME FOR THE RECORD, AND SPELL YOUR LAST NAME.

A. APRIL DeANNE McFALLS.

Q. AND, MS. McFALLS, WHERE ARE YOU EMPLOYED?

A. UNION COUNTY JAIL.

Q. IN WHAT CAPACITY?

A. I'M A JAILER.

Q. AND HOW LONG HAVE YOU BEEN A JAILER FOR UNION COUNTY?

A. SINCE MAY OF 1997.

Q. IN MAY OF 1997, WHERE WAS THE JAIL LOCATED?

A. WE WERE AT THE CITY JAIL.

Q. AND WHERE IS IT NOW?

A. THE COUNTY JAIL IS NOW OUT NEXT TO THE CHAIN GANG.

Q. AND WHERE EXACTLY IS THE CITY LOCATED – YOU SAID THE [1467] CITY, WHAT DO YOU MEAN BY THAT?

A. THE CITY JAIL UP ON MAIN STREET.

Q. OKAY. YOU WERE WORKING AT THE CITY JAIL IN MAY?

A. YES, MA'AM. DO YOU RECALL – ARE YOU AWARE OF THE RULES CONCERNING CONTRABAND?

A. YES, MA'AM.

Q. COULD YOU TELL THE COURT WHAT THOSE RULES ARE?

THE COURT: ASK HER WHAT THE RULES WERE IN MAY OF 1997.

Q. IN MAY OF 1997, PLEASE TELL US WHAT THE RULES WERE.

MR. BANKS: OBJECTION, YOUR HONOR, AS TO RELEVANCE. THE ONLY ISSUE AT THIS POINT IS SMOKE, A CIGARETTE LIGHTER, AND A CIGARETTE.

THE COURT: I'LL ASK THAT HER ANSWER BE RESTRICTED TO THE POLICY IN REGARD TO THIS MATTER.

Q. DID YOU HAVE ANY RULES REGARDING LIGHTERS OR CIGARETTES?

A. YES, MA'AM.

Q. WHAT WERE THEY?

A. THEY WERE NOT TO BE ANY LIGHTERS OR CIGARETTES IN THE CELLBLOCK AREA.

Q. OKAY. WERE YOU WORKING WITH UNION COUNTY ON OCTOBER 28TH, 1997?

A. YES, MA'AM.

Q. AND WHERE WAS THE JAIL LOCATED IN THAT MONTH?

[1468] A. WE WERE UP AT THE CHAIN GANG.

Q. WHEN DID Y'ALL MOVE?

A. WE MOVED IN JULY.

Q. CAN YOU TELL US WHAT, IF ANYTHING, UNUSUAL HAPPENED ON OCTOBER 28TH?

A. YES, MA'AM. ON OCTOBER 28TH I HAD A GROUP OF INMATES OUT IN THE DAY ROOM AREA WHICH IS IN THE BACK OF THE JAIL WHERE THEY COULD CONVERSATE, USE THE PHONE, VISIT OTHER INMATES AND GET THEIR EXERCISE. THAT GROUP'S TIME WAS UP FOR THE DAY, AND I WAS GOING TO PUT THEM UP, AND LET THE OTHER INMATES OUT. AND I CALLED BACK TO THE DAY

ROOM AREA OVER THE INTERCOM. I WAS UP FRONT IN THE BOOKING AREA. SO, I CALLED BACK OVER THE LOUDSPEAKER AND I ASKED IF ANYONE WAS ON THE PHONE. NO ONE ANSWERED ME, SO I ASSUMED NO ONE WAS ON THE PHONE.

Q. HOW WOULD THEY BE ABLE TO ANSWER YOU?

A. THE INTERCOM SYSTEM. WHEN WE TURN THE SWITCH ON, IT'S TWO-WAY; WE CAN SPEAK TO THEM, AND THEY CAN SPEAK BACK.

Q. AND YOU SAID THEY WERE IN THE DAY ROOM?

A. YES, MA'AM.

Q. IS THAT WHAT YOU CALLED IT?

A. YES, MA'AM.

Q. AND YOU SAY THAT'S WHERE THEY VISIT WITH EACH OTHER?

A. THAT'S WHEN THEY HAVE THEIR EXERCISE TIME, USE THE PHONE, SHOWERS. THEY HAVE ANYWHERE FROM TWO TO THREE [1469] HOURS AT A TIME, DEPENDING ON HOW MANY INMATES WE HAVE IN THE JAIL.

Q. AND WHEN YOU SAY YOU PUT THEM UP, ARE THEY ALLOWED TO VISIT ONCE YOU PUT THEM UP?

A. LATER ON IN THE DAY THEY CAN VISIT. OR WHEN WE ARE PUTTING THEM UP, IF THEY DECIDE TO VISIT EACH OTHER OR PLAY GAMES, WE CAN

PUT THEM IN EACH OTHER'S CELL, LOCK THEM UP, AND THEN ALLOW ANOTHER GROUP TO COME OUT AND GET THEIR TIME.

Q. AND YOU SAID SOMETHING OVER THE INTERCOM?

A. I ASKED OVER THE LOUDSPEAKER IF ANYONE WAS ON THE TELEPHONE JUST TO LET THEM KNOW THAT I WAS FIXING TO CUT THE PHONES OFF AT THE JAIL, TO TELL WHOEVER WAS ON THE PHONE BY, I LOVE YOU, OR WHATEVER, GIVE THEM A CHANCE TO SAY GOODBY. NO ONE ANSWERED ME, SO I WALKED OVER TO THE PHONE SWITCHES THAT WE HAVE UP IN THE BOOKING AREA THAT TURNS THE TELEPHONE OFF, AND I TURNED THE SWITCHES OFF.

Q. WHY DO YOU DO THAT?

A. I HAVE HAD PROBLEMS IN THE PAST WHEN YOU TELL AN INMATE TO GET OFF THE PHONE, YOU CAN GIVE THEM FIVE MINUTES AND THEY STILL WON'T GET OFF THE PHONE, AND I HAVE HAD TO HANG UP THE PHONE PHYSICALLY ON AN INMATE, AND I'VE HAD A PHONE RECEIVER SLUNG AND HIT ME.

Q. SO, THIS IS THE WAY YOU HAVE TO DO IT NOW?

A. THIS WAY I HAVE NO PHYSICAL CONTACT WITH THEM.

[1470] Q. PLEASE GO AHEAD.

A. AFTER I TURNED THE PHONES OFF UP IN THE BOOKING AREA, I WENT THROUGH THE DAY ROOM DOOR, AND AS I GO THROUGH THE DOOR WESLEY SHAFER APPROACHES ME. HE WAS YELLING AND USING PROFANITY. DO I NEED TO TELL YOU EXACTLY WHAT HE SAID?

Q. PLEASE TELL US EXACTLY WHAT HE SAID.

A. WESLEY APPROACHES ME, HE COMES UP TO ME, AND HE WANTS TO KNOW "WHY THE FUCK DID YOU TURN OFF THE PHONE?" I SAID, EXCUSE ME? BECAUSE IT SHOCKED ME. HE SAID, "WHY THE FUCK DID YOU TURN OFF THE PHONE YOU FUCKING WHORE". AND AT THAT TIME I NOTICED HE WAS UPSET, AND TO KEEP FROM HAVING ANY PHYSICAL CONTACT, I START WALKING TOWARD THE CELL HOPING HE WOULD FOLLOW ME. HE KEPT ON YELLING AND SCREAMING. AND I TURNED AND I SAID, WESLEY, TIME IS UP, IT'S TIME FOR THE OTHER GROUP. HE CAME AND GOT UP IN MY FACE AND POINTED AT ME AND SAID, "YOU WANT ME TO GO OFF; YOU WANT ME TO GO OFF; YOU'RE GOING TO GET WHAT YOU'RE ASKING FOR." HE WAS SO CLOSE IN MY FACE THAT THE SPIT FROM HIS MOUTH LANDED ON MY FACE. I DIDN'T WANT TO MAKE ANY KIND OF PHYSICAL CONTACT WITH HIM. I THOUGHT THE BEST THING TO DO WAS TO GET HIM IN HIS CELL. WE WALKED TO HIS CELL; HE FOLLOWED ME; I OPENED THE DOOR, AND I TOLD HIM TO GO IN HIS CELL. HE WENT IN HIS CELL, AND I LOCKED THE DOOR. AFTER I LOCKED THE DOOR, I TOLD HIM HE [1471] WAS ON THREE DAY LOCK-DOWN FOR WHAT HAD HAPPENED. AND

AFTER I LOCKED THE DOORS AND STARTED TO WALK AWAY, HE TOLD ME, HE SAID "THAT'S WHY YOU LEFT THE PRISON, YOU'RE TOO SOFT, YOU'RE TOO SOFT, YOU'D NEVER MAKE IT".

Q. WHAT DID HE MEAN BY THAT'S WHY YOU LEFT THE –

MR. BANKS: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION. SHE CAN'T TESTIFY AS TO WHAT HE MEANS.

Q. WHERE DID YOU WORK BEFORE YOU STARTED WORKING FOR THE COUNTY?

A. I WAS A CORRECTIONAL OFFICER AT CROSS ANCHOR CORRECTIONAL INSTITUTION.

Q. WERE ANY CHARGES BROUGHT?

A. YES, MA'AM; I SIGNED A WARRANT ON HIM FOR WHAT HAD HAPPENED.

Q. WHAT WERE THE CHARGES?

A. THE CHARGES WERE SIMPLE ASSAULT.

MS. MILLER: THE COURT'S INDULGENCE, YOUR HONOR.

THE COURT: YES MA'AM.

(AFTER A BRIEF PAUSE)

MS. MILLER: PLEASE ANSWER ANY QUESTIONS THAT THE DEFENSE HAS FOR YOU.

A. YES, MA'AM.

THE COURT: CROSS?

MR. BANKS: YOUR HONOR, I WOULD ASK THAT THE JURY [1472] BE EXCUSED.

THE COURT: I'LL LET YOU GO TO THE JURY ROOM FOR JUST A MINUTE.

IN CAMERA:

THE COURT: YES, SIR?

MR. BANKS: THANK YOU, YOUR HONOR. YOUR HONOR, WE MOVE TO STRIKE UNDER RULE 16-320 BOTH IN THE UNDERLYING CODE AND IN THE SUPPLEMENT. UNDER 16-320(B) WHICH DEALS WITH IN A SENTENCING PROCEEDING THE JUDGE OR JURY SHOULD HEAR ADDITIONAL EVIDENCE IN EXTENUATION OR MITIGATION OR AGGRAVATION OF THE PUNISHMENT. ONLY SUCH EVIDENCE IN AGGRAVATION AS THE STATE HAS INFORMED THE DEFENDANT OF IN WRITING BEFORE THE TRIAL IS ADMISSIBLE.

16-320(C) IS THE ONE THAT DEALS WITH THE STATUTORY AGGRAVATORS. CONTRABAND IS NOT A STATUTORY AGGRAVATOR. SIMPLE ASSAULT IS NOT A STATUTORY AGGRAVATOR. THEREFORE, WE WOULD BE LIMITED TO 16-320(B) WHICH WOULD BE EVIDENCE IN AGGRAVATION IN ADDITION TO STATUTORY AGGRAVATORS THAT WE HAVE BEEN GIVEN NOTICE OF IN WRITING.

WE HAVEN'T BEEN GIVEN NOTICE OF EITHER THE VIOLATION OF CONTRABAND OR SIMPLE ASSAULT AS AN AGGRAVATOR.

THE COURT: MR. POPE? I'M SORRY, MR. BRACKET?

MR. BRACKETT: SOLICITOR POPE IS NOT IN HERE. I THINK THE NOTICE OF EVIDENCE IN AGGRAVATION SETS OUT WHAT STATUTORY AGGRAVATING FACTORS THE STATE SEEKS TO RELY ON, AND [1473] IN ADDITION WHAT OTHER, REFERENCING THE ONES MR. BANKS IS TALKING ABOUT, THE NON-STATUTORY AGGRAVATING CIRCUMSTANCES SUCH AS HIS CHARACTER AND SO FORTH.

THERE IS NO REQUIREMENT THAT WE SET OUT IN DETAIL WORD FOR WORD WHAT THE TESTIMONY OF EACH WITNESS IS. THAT IS AN OVERREADING OF –

THE COURT: YOUR POSITION IS THIS IS GOING TO CHARACTER?

MR. BRACKETT: YES, SIR, IT GOES TO CHARACTER, AND ALSO –

THE COURT: WAIT JUST A MINUTE. DID YOU NOTICE THAT CHARACTER WAS GOING TO BE ONE OF THE ISSUES IN AGGRAVATION?

MR. BRACKETT: IF THE COURT WILL INDULGE ME FOR JUST ONE MOMENT.

(AFTER A BRIEF PAUSE)

MR. BRACKETT: YES, SIR. SOLICITOR POPE PREPARED THAT NOTICE OF EVIDENCE IN AGGRAVATION. HE INFORMS ME THAT IT IS. I DON'T HAVE A COPY. HE'S GOING TO GET IT.

(AFTER A BRIEF PAUSE)

MR. BANKS: DO YOU WANT TO SEE IT?

THE COURT: YES, HAND ME A COPY UP.

(A COPY WAS GIVEN TO THE COURT)

MR. BRACKETT: THE LAST PARAGRAPH ON THE FIRST PAGE OF THE NOTICE OF EVIDENCE IN AGGRAVATION.

[1474] **MR. BANKS:** YOUR HONOR, WE WOULD NOTE THAT EVERY PARAGRAPH GOES TO PRIOR TO THIS INCIDENT EXCEPT FOR THE THIRD TO THE LAST ON THE SECOND PAGE, THE LAST SENTENCE WHICH REFERS TO CHARACTER AND PROPENSITY FOR VIOLENCE IN THE FUTURE. I THINK THERE IS ONE SENTENCE THAT GOES TO POST TO ARREST; THE REST OF THE ENTIRE BOILERPLATE LANGUAGE GOES TO PRIOR BAD ACTS.

MR. BRACKETT: NO, SIR. THE FIRST SENTENCE IN THE LAST PARAGRAPH. "THE STATE WILL PRESENT ANY AND ALL EVIDENCE RELATING TO PRIOR BAD ACTS, AND OTHER EVIDENCE RELATING TO THE DEFENDANT'S CHARACTER OCCURRING AT ANY TIME PRIOR TO THE CONCLUSION OF THE CASE". WHICH I BELIEVE WOULD BE NOW, OR HE COULD WALK OUT OF HERE AND DO SOMETHING, AND THAT COULD BE BROUGHT UP.

THE COURT: SHOW ME WHICH PARAGRAPH – Y'ALL HAVE POINTED ME TO THREE DIFFERENT PARAGRAPHS BEFORE I'VE HAD A CHANCE TO FINISH THE FIRST ONE.

MR. BRACKETT: FIRST PAGE THE LAST PARAGRAPH THAT BEGINS "THE STATE WILL PRESENT ANY AND ALL EVIDENCE".

THE COURT: ALL RIGHT.

MR. BRACKETT: AND IT GOES ON AND TALKS ABOUT LAWS, RULES, REGULATIONS. THROUGHOUT THAT PARAGRAPH IT DISCUSSES THAT.

THE COURT: I OVERRULE THE OBJECTION.

MR. BANKS: I'M SORRY, YOUR HONOR?

[1475] **THE COURT:** I OVERRULE THE OBJECTION. BRING IN THE JURY. IN THE PRESENCE OF THE JURY:

THE COURT: YOU MAY PROCEED.

CROSS EXAMINATION BY

MR. NETTLES:

Q. WHAT IS YOUR TITLE, CORRECTIONAL OFFICER?

A. JAILER.

Q. JAILER?

A. YES.

Q. MS. McFALLS, YOU FILLED OUT AN INCIDENT REPORT ON THIS; ISN'T THAT CORRECT?

A. YES, SIR.

Q. DO YOU HAVE A COPY OF THAT?

A. YES, SIR.

Q. AND IN THAT INCIDENT REPORT YOU PUT ALOT OF INFORMATION ON IT, DIDN'T YOU?

A. I WROTE IT DOWN.

THE COURT: I'M SORRY; I DIDN'T HEAR THE ANSWER.

A. I WROTE DOWN WHAT HAD HAPPENED.

Q. OKAY, YOU WROTE DOWN WHAT HAD HAPPENED. AND SOME OF THE THINGS YOU WROTE DOWN WAS THAT YOU TOOK THE TIME TO WRITE DOWN THE INCIDENT DATE. RIGHT?

A. RIGHT.

Q . AND THAT'S A DETAIL THAT YOU INCLUDED ON YOUR REPORT; [1476] ISN'T THAT RIGHT?

A. YES.

Q. AND YOU WROTE THE ADDRESSES OF THE DIFFERENT PEOPLE, YOU, WHERE THE INCIDENT TOOK PLACE?

A. YES.

Q. AND YOU WROTE DOWN THE TIME?

A. YES, SIR.

Q. AND THAT'S PRECISELY THE TIME IT TOOK PLACE, RIGHT?

A. APPROXIMATELY.

Q. APPROXIMATE TIME. AND THEN YOU WROTE DOWN THE STATE, AND YOU WROTE DOWN THE PHONE NUMBERS; YOU WROTE DOWN ALL THESE OTHER VARIOUS DETAILS; ISN'T THAT RIGHT?

A. YES, SIR.

Q. THIS IS AN ACCURATE, PRECISE AND DETAILED INCIDENT REPORT YOU'VE GOT HERE ISN'T IT?

A. YES, SIR.

Q. AND IN THIS ACCURATE, PRECISE AND DETAILED INCIDENT REPORT YOU HAVE, WHERE IS THERE ANY MENTION OF A STATEMENT "YOU'RE GOING TO MAKE ME GO OFF" IN YOUR ACCURATE, PRECISE AND DETAILED INCIDENT REPORT?

A. THERE ISN'T ONE.

Q. AND IN YOUR ACCURATE, PRECISE AND DETAILED INCIDENT REPORT THAT YOU FILLED OUT RIGHT AFTER IT HAPPENED, ISN'T THAT RIGHT?

A. YES, SIR.

[1477] Q. SO, IT'S FRESH IN YOUR MIND; RIGHT?

A. YES, SIR.

Q. YOU SAID I'M GOING TO WRITE DOWN EVERYTHING THAT HAPPENED SO THAT I CAN REMEMBER IT; ISN'T THAT RIGHT?

A. YES, SIR.

Q. WHERE IN YOUR ACCURATE, PRECISE AND DETAILED INCIDENT REPORT THAT WAS COMPLETED RIGHT AFTER IT TOOK PLACE IS THERE ANY MENTION OF "THAT IS WHY YOU ARE HERE BECAUSE YOU WERE TOO SOFT"; WHERE IS THERE ANY MENTION OF THAT?

A. IT'S NOT IN THIS REPORT.

Q. OKAY. NOW, LET'S TALK ABOUT THAT STATEMENT FOR A MOMENT. YOU'VE WORKED AT A PRISON?

A. YES, SIR.

Q. IT'S A TOUGH PLACE, ISN'T IT?

A. YES, SIR.

Q. AND IT'S NOT A VERY PRETTY PLACE TO BE, IS IT?

A. NO, SIR.

Q. IT WOULD BE A VERY DIFFICULT PLACE TO BE FOR THE REST OF YOUR LIFE, WOULDN'T IT?

A. YES, SIR.

Q. I HAVE NO FURTHER QUESTIONS.

THE COURT: ANY REDIRECT?

MS. MILLER: NO, SIR. WE WOULD ASK THAT SHE BE EXCUSED.

THE COURT: YOU MAY BE EXCUSED. THANK YOU. CALL [1478] YOUR NEXT WITNESS.

MS. MILLER: ELAINE PEAKE.

ELAINE PEAKE, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MS. MILLER:

Q. PLEASE STATE YOUR NAME FOR THE RECORD, AND SPELL YOUR LAST NAME.

A. ELAINE PEAKE, P-E-A-K-E.

Q. MS. PEAKE, WHERE ARE YOU EMPLOYED?

A. UNION COUNTY JAIL.

Q. AND IN WHAT CAPACITY?

A. JAILER.

Q. WERE YOU SO EMPLOYED ON SEPTEMBER 16TH, 1997?

A. YES.

Q. OKAY. TELL US WHAT, IF ANYTHING, UNUSUAL HAPPENED ON THAT AFTERNOON.

A. ON THAT AFTERNOON I WENT TO ESCORT AN INMATE BACK TO HIS CELL, AND I NOTICED B-1 WAS SMOKEY AS I WALKED PASSED. SO, I PUT THE INMATE UP, AND I CAME BACK.

Q. WHAT IS B-1?

A. IT'S A CELL.

Q. AND WHO WAS IN THAT CELL?

A. IT'S WESLEY SHAFER'S CELL. HE WAS IN THERE WITH TWO OTHER INMATES. TWO OTHER INMATES WERE VISITING.

[1479] Q. OKAY, TELL US WHAT HAPPENED THERE.

A. I OPENED THE DOOR AND I LOOKED IN, AND I SAID WHAT ARE YOU DOING, AND CLOSED THE DOOR BACK, AND WENT BACK TO THE FRONT.

Q. WHAT HAPPENED THEN?

A. I TOLD ROBIN PEAKE THAT I THOUGHT THEY WERE SMOKING IN THE CELL. WHEN I OPENED THE DOOR, THEY WERE SMOKING.

Q. WHAT HAPPENED NEXT?

A. WE TOLD JEFF LAWSON, AND HE TOLD US TO BRING WESLEY UP FRONT. WE BROUGHT HIM TO THE FRONT TO TALK TO JEFF, AND THEN ME AND ROBIN AND WESLEY WENT BACK AND WE SEARCHED HIS CELL.

Q. AND WHAT HAPPENED?

A. WE WERE SEARCHING THE CELL, FLIPPED THE MATTRESS UP AND FOUND A PACK OF CIGARETTES AND A LIGHTER.

Q. WERE YOU SO EMPLOYED WHEN THE JAIL MOVED FROM THE CITY TO THE COUNTY?

A. YES.

Q. CAN YOU TELL US, ARE THERE RULES CONCERNING CIGARETTES AND LIGHTERS AT THE COUNTY JAIL WHERE IT IS PRESENTLY LOCATED?

A. YES. AT THE COUNTY JAIL CIGARETTES OR ANYTHING LIKE THAT IS TAKEN AS CONTRABAND.

Q. DID YOU MAKE CHARGES CONCERNING THIS INCIDENT?

A. YES.

[1480] Q. WHAT CHARGES WERE THEY?

A. POSSESSION OF CONTRABAND.

Q. YOU SAY THERE ARE RULES?

A. UH HUH.

Q. IS MR. SHAFER AWARE OF THOSE RULES OR DO YOU KNOW?

MR. BANKS: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION.

MS. MILLER: COURT'S INDULGENCE.

(AFTER A BRIEF PAUSE)

Q. MS. PEAKE, HOW ARE INMATES APPRISED OF THE RULES IN THE COUNTY JAIL?

A. WHEN YOU BRING AN INMATE IN, WE HAVE TO READ THEM THE RULES AT THE JAIL.

Q. OKAY, AND DID YOU DO SO WITH MR. SHAFER?

A. YES.

Q. OKAY, THANK YOU. PLEASE ANSWER ANY QUESTIONS THE DEFENSE MAY HAVE.

CROSS EXAMINATION BY

MR. NETTLES:

Q. MA'AM, I'M SORRY, I DIDN'T GET YOUR NAME.

A. ELAINE PEAKE.

Q. IS THAT P-E-A-K?

A. P-E-A-K-E.

Q. JAILER PEAKE, YOU FOUND CIGARETTES IN WESLEY'S CELL?

A. YES.

[1481] Q. DO YOU REMEMBER WHAT BRAND OF CIGARETTES THEY WERE?

A. MARLBORO LIGHTS.

Q. SO, THEY WEREN'T HOMEMADE CIGARETTES, THEY WERE BRAND MANUFACTURED CIGARETTES?

(THE WITNESS SHOOK HER HEAD IN THE AFFIRMATIVE.)

Q. AND CIGARETTES ARE CONSIDERED CONTRABAND?

A. UH HUH.

Q. SO, WHEN YOU FOUND THE CIGARETTES, YOU MADE A CONTRABAND CHARGE?

A. YES.

Q. I HAVE NO FURTHER QUESTIONS OF THIS WITNESS.

MS. MILLER: NO FURTHER QUESTIONS. MAY THIS WITNESS BE EXCUSED?

THE COURT: YOU CAN STEP DOWN, AND BE EXCUSED.

MR. BRACKETT: THE STATE CALLS RICK WILLIAMS.

RICHARD M. WILLIAMS, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. BRACKETT:

Q. SIR, WOULD YOU PLEASE STATE YOUR FULL NAME, AND TELL US WHERE YOU ARE EMPLOYED?

A. MY FULL NAME IS RICHARD MELVIN WILLIAMS; I AM EMPLOYED WITH THE SOUTH CAROLINA DEPARTMENT OF PROBATION AND PAROLE SERVICES.

Q. HOW LONG HAVE YOU BEEN WITH PROBATION AND PAROLE?

[1482] A. I'VE BEEN WITH PROBATION AND PAROLE DEPARTMENT FOR AT LEAST SIX AND A HALF YEARS. IT WILL BE SEVEN IN JUNE.

Q. WHAT DO YOU DO FOR THEM?

A. I WAS AN INTENSIVE AGENT WHERE I HANDLED CLIENTS OF HIGH RISK.

Q. OKAY, SIR. AND WERE YOU DOING THAT BACK IN FEBRUARY OF 1996?

A. THAT IS CORRECT.

Q. DO YOU KNOW THE DEFENDANT IN THIS CASE, WESLEY AARON SHAFER?

A. YES, I DO.

Q. HOW DO YOU KNOW HIM?

A. WESLEY CAME TO MY OFFICE, HE HAD RECEIVED A CHARGE FROM YORK COUNTY FOR CRIMINAL SEXUAL CONDUCT.

Q. ANY OTHER CHARGES?

A. YES, HE HAD A BURGLARY SECOND DEGREE.

Q. AND WHAT WERE THE TERMS AND CONDITIONS OF HIS PROBATION?

A. THE TERMS AND CONDITIONS OF HIS PROBATION WAS HE WAS ON HOME DETENTION FOR AT LEAST SIX MONTHS. THAT IS SOMETHING LIKE HOUSE ARREST WHERE HE'S SUPPOSED TO BE AT HOME. HE WAS TO RECEIVE SEXUAL OFFENDER COUNSELING, AND SEVERAL OTHER THINGS SUCH AS REPORTING, FOLLOWING THE RULES OF PROBATION.

Q. AND WHO WAS RESPONSIBLE FOR INSURING THAT WESLEY AARON SHAFER COMPLIED WITH ALL OF THOSE TERMS AND CONDITIONS?

[1483] A. WESLEY HIMSELF.

Q. AND WHO WAS RESPONSIBLE FOR MAKING SURE HE DID?

A. I USUALLY ENFORCE THEM.

Q. WHEN DID HE BECOME A PROBATIONER UNDER YOUR CHARGE, WHAT DATE? DO YOU HAVE THAT INFORMATION?

A. IF I CAN RECALL, THAT DATE WAS FEBRUARY OF '96. I DON'T HAVE THE EXACT DATE.

Q. APPROXIMATELY HOW LONG DID YOU SUPERVISE HIM ON PROBATION?

A. I SUPERVISED HIM FOR APPROXIMATELY – I THINK IT WAS FEBRUARY TO DECEMBER OF '96 – FEBRUARY OF '96 TO DECEMBER OF '96.

Q. ALL RIGHT, SIR. AND COULD YOU TELL THE JURY GENERALLY HOW DID HE DO ON PROBATION?

MR. BANKS: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION.

Q. DID HE COMPLY WITH ALL OF THE TERMS AND CONDITIONS OF HIS PROBATION, AGENT WILLIAMS?

A. NO, HE DIDN'T.

Q. HOW DID HE VIOLATE THEM?

A. HE WAS ARRESTED FOR A DUS IN JULY OF '96, AND OPERATING AN UNINSURED VEHICLE. ALSO, THERE WAS A BURGLARY SECOND DEGREE

CHARGE. AND HE TESTED POSITIVE FOR MARIJUANA.

Q. WHEN DID HE TEST POSITIVE FOR MARIJUANA?

A. HE TESTED POSITIVE FOR MARIJUANA IN DECEMBER. I THINK IT [1484] WAS DECEMBER 3RD OF '96.

Q. OKAY. NOW, DID YOU EVER HAVE OCCASION TO GO TO HIS HOME?

A. YES, I DID.

Q. DID YOU EVER HAVE OCCASION TO MEET HIS PARENTS?

A. YES, I MET HIS MOTHER.

Q. AND DID YOU EVER NOTICE IN YOUR VISITS TO HIS HOUSE OR IN MEETINGS WITH HIS MOTHER, DID YOU EVER NOTICE ANYTHING UNUSUAL?

A. NO, I DIDN'T.

Q. WHEN DID YOU STOP SUPERVISING HIM ON PROBATION?

A. SOMETIME IN DECEMBER OF '96.

Q. WHO TOOK OVER AFTER YOU STOPPED?

A. DIANE JAMES.

Q. THANK YOU VERY MUCH, AGENT WILLIAMS. PLEASE ANSWER ANY QUESTIONS COUNSEL FOR THE DEFENSE HAS FOR YOU.

CROSS EXAMINATION BY

MR. NETTLES:

Q. OFFICER, I SENT AN INVESTIGATOR OUT TO TALK TO YOU, DIDN'T I?

A. THAT IS CORRECT.

Q. YOU TOLD HIM YOU DIDN'T WANT TO COME IN HERE AND TESTIFY, DIDN'T YOU?

A. I DON'T RECALL THAT, SIR.

Q. YOU DON'T RECALL THAT? YOU DON'T RECALL TELLING [1485] LAWRENCE MCKEELY THAT YOU DIDN'T WANT TO COME IN HERE AND TESTIFY AGAINST WESLEY SHAFER?

A. NO, SIR, I DON'T RECALL TELLING HIM THAT, SIR.

Q. YOU'RE NOT DENYING THAT YOU TALKED TO HIM?

A. I'M NOT DENYING THAT I DID TALK TO HIM.

Q. YOU WENT OUT TO WESLEY'S HOUSE ONE TIME?

A. THAT'S CORRECT.

Q. YOU DIDN'T WITNESS ANYBODY SETTING ANYBODY ON FIRE?

A. NO, SIR.

Q. YOU DIDN'T SEE HIS DADDY SET ANYBODY ON FIRE DID YOU?

A. NO, I DIDN'T, SIR.

Q. YOU DIDN'T SEE HIS DADDY KICKING WESLEY, DID YOU?

A. NO, I DIDN'T, SIR.

Q. YOU DIDN'T SEE HIS DADDY SLAPPING WESLEY, DID YOU?

A. NO, I DIDN'T, SIR.

Q. YOU DIDN'T SEE WESLEY LOCKED OUT IN THE COLD?

A. NO, I DIDN'T.

Q. YOU DIDN'T SEE WESLEY'S DAD THROWING HIS CHILDREN OUT IN THE FRONT YARD IN THEIR UNDERWEAR, DID YOU?

A. THAT IS CORRECT, SIR, I HAVEN'T.

Q. AS A MATTER OF FACT, HIS DADDY WASN'T EVEN THERE, WAS HE?

A. ACCORDING TO HIM, HIS DAD WAS THERE.

Q. WHAT ABOUT YOU, DID YOU SEE HIM?

A. NO, I DIDN'T.

[1486] Q. I HAVE NO FURTHER QUESTIONS.

MR.BRACKETT: JUST A COUPLE OF QUESTIONS ON REDIRECT, YOUR HONOR.

THE COURT: CERTAINLY.

REDIRECT EXAMINATION BY

MR. BRACKETT:

Q. AGENT WILLIAMS, MR. NETTLES ASKED YOU NUMEROUS QUESTIONS ABOUT BEATINGS, BURNINGS AND THAT SORT OF THING, DID YOU EVER IN THE ENTIRE NINE MONTHS THAT YOU SUPERVISED HIM NOTICE ANY SIGNS OF ABUSE ON MR. SHAFER?

A. NO, I DIDN'T.

Q. THANK YOU.

RECROSS EXAMINATION BY

MR. NETTLES:

Q. AGENT, YOU ARE AWARE, AREN'T YOU, THAT DRUG USE BY YOUNG PEOPLE IS OFTEN A SIGN OF AN ABUSE, ISN'T IT?

MR. BRACKETT: OBJECTION, YOUR HONOR.

THE COURT: WELL, HE CAN SAY HE'S NOT AWARE OF IT IF HE'S NOT.

Q. AND YOU'RE ALSO AWARE THAT SOMETIMES FAILURE TO COMPLY WITH PROBATION CAN BE A SIGN OF ABUSE, AREN'T YOU?

A. SIR, IF HE WASN'T COMPLYING, THERE WERE ACTIONS THAT I TOOK.

Q. I UNDERSTAND THAT, THAT'S NOT WHAT I'M ASKING YOU. I'M ASKING YOU, YOU ARE AWARE THAT FAILURE TO COMPLY - IN [1487] OTHER WORDS, MARIJUANA OR ACTING OUT AS A YOUNG CHILD, A CHILD OF WESLEY'S AGE CAN BE A SIGN OF ABUSE. YOU ARE AWARE OF THAT, AREN'T YOU?

MR. BRACKETT: OBJECTION, YOUR HONOR.

THE COURT: OVERRULED.

A. I GUESS YOU CAN SAY THAT, SIR.

Q. SO, THEN IN SOME RESPECTS PERHAPS, AND I UNDERSTAND YOU HAVE A LOT OF PROBATIONERS, THERE COULD HAVE BEEN SOME SIGNS OF ABUSE THAT MAYBE YOU JUST MISSED?

MR. BRACKETT: YOUR HONOR, THAT CALLS FOR SPECULATION.

THE COURT: I SUSTAIN THE OBJECTION.

Q. THANK YOU VERY MUCH.

THE COURT: YOU CAN STEP DOWN, AND BE EXCUSED.

MR. BRACKETT: THE STATE WILL CALL AGENT DIANE JAMES.

DIANE JAMES, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. BRACKETT:

Q. MA'AM, WOULD YOU PLEASE STATE YOUR FULL NAME, AND TELL THE JURY WHERE YOU ARE EMPLOYED?

A. MY NAME IS DIANE JAMES; I AM EMPLOYED WITH THE SOUTH CAROLINA DEPARTMENT OF PROBATION IN CHESTER COUNTY.

Q. YOU WORK WITH AGENT WILLIAMS?

[1488] A. YES, SIR.

Q. DO YOU KNOW THE DEFENDANT WESLEY AARON SHAFER?

A. YES, SIR.

Q. HOW DO YOU KNOW HIM?

A. I WAS HIS SUPERVISING AGENT FROM DECEMBER OF 1996 UNTIL APRIL OF 1997.

Q. ALL RIGHT, MA'AM. NOW, DURING THE TIME PERIOD THAT YOU SUPERVISED HIM, DID HE COMPLY WITH ALL OF THE CONDITIONS – DID HE VIOLATE ANY OF HIS CONDITIONS OF PROBATION?

A. YES, SIR.

Q. WHAT WERE THE CONDITIONS THAT HE VIOLATED?

A. IN MARCH OF '97 HE MISSED HIS REPORT; AND ALSO ON APRIL 10TH OF 1997 HE TESTED POSITIVE FOR MARIJUANA; AND HE ALSO MISSED A COUPLE OF REPORTS TO HIS SEX OFFENDER COUNSELING.

Q. WHAT KIND OF COUNSELING?

A. SEX OFFENDER COUNSELING.

Q. THANK YOU VERY MUCH, AGENT. ANSWER ANY QUESTIONS THAT THE DEFENSE MAY HAVE.

CROSS EXAMINATION BY

MR. NETTLES:

Q. AGENT JAMES, WESLEY SHAFER SHOWED UP A LOT OF TIMES, DIDN'T HE?

A. YES, SIR.

Q. YOU DIDN'T TELL THE JURY THAT, DID YOU?

[1489] A. I WASN'T ASKED THAT.

Q. ALL RIGHT, SO WE HAVE TO ASK YOU TO GET GOOD INFORMATION, DON'T WE?

MR. BRACKETT: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION. LET'S JUST STICK TO QUESTIONS AND ANSWERS.

Q. MR. SHAFER SHOWED UP A LOT OF TIMES, DIDN'T HE?

A. YES, SIR.

Q. HE GOT A JOB, DIDN'T HE?

A. YES, SIR.

Q. HE ACTUALLY GOT SEVERAL JOBS, DIDN'T HE?

A. YES, SIR.

Q. HE SHOWED UP FOR COUNSELING ON A NUMBER OF OCCASIONS, DIDN'T HE?

A. YES, SIR, HE DID.

Q. AS A MATTER OF FACT, HE REPORTED MORE TIMES THAN HE DIDN'T?

A. YES, SIR. I ONLY HAVE HIM MISSING ONE REPORT.

Q. THANK YOU VERY MUCH. I HAVE NO OTHER QUESTIONS.

MR. BRACKETT: NO FURTHER QUESTIONS. I ASK THAT THIS WITNESS BE EXCUSED.

THE COURT: YOU CAN STEP DOWN AND BE EXCUSED. THANK YOU.

MR. BRACKETT: THE STATE WOULD CALL ROBERT NEWTON TO THE STAND, YOUR HONOR.

[1490] **ROBERT NEWTON, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

DIRECT EXAMINATION BY

MR. BRACKETT:

Q. WOULD YOU STATE YOUR FULL NAME, AND SPELL YOUR LAST?

A. ROBERT ERVIN NEWTON, N-E-W-T-O-N.

Q. HOW OLD ARE YOU?

A. 19.

Q. WHERE DO YOU LIVE?

A. 401 WEST HIGH STREET.

Q. WHERE IS THAT?

A. RIGHT ACROSS THE STREET FROM THE HOSPITAL.

Q. SAY THAT AGAIN?

A. RIGHT ACROSS THE STREET FROM THE HOSPITAL.

Q. IN WHAT CITY?

A. UNION.

Q. DO YOU KNOW THIS INDIVIDUAL SEATED OVER HERE, WESLEY AARON SHAFER?

A. YES, SIR.

Q. HOW DO YOU KNOW HIM?

A. I WAS IN JAIL WITH HIM.

Q. WHEN WAS THAT?

A. BACK IN MAY.

Q. BACK IN MAY OF WHAT YEAR?

A. '97.

[1491] Q. WHAT WERE YOU DOING IN JAIL?

A. THIRD DUI.

Q. DUI THIRD OFFENSE?

A. YES, SIR.

Q. NOW, CAN YOU DESCRIBE WHERE THE JAIL WAS LOCATED WHEN YOU WERE IN JAIL WITH HIM?

A. IT WAS LOCATED AT THE CITY POLICE DEPARTMENT.

Q. HERE IN THE CITY OF UNION?

A. UH HUH.

Q. CAN YOU DESCRIBE BASICALLY WHAT THE LAYOUT OF THE JAIL IS?

A. THERE'S TWO DRUNK TANKS; THERE'S FIVE TWO MAN CELLS ON EACH SIDE, AND THERE'S A DAY ROOM.

Q. PEOPLE THAT WERE IN THE OLD JAIL ACROSS THE STREET, WERE THEY ABLE TO TALK TO ONE ANOTHER IN THE JAIL?

A. YES, SIR.

Q. AND WERE YOU ABLE TO TALK TO WESLEY SHAFER?

A. YES, SIR.

Q. HOW LONG WERE YOU IN JAIL WITH WESLEY SHAFER, ABOUT HOW LONG?

A. ABOUT TWO MONTHS.

Q. AT ANY POINT IN TIME DID YOU DISCUSS WITH HIM THE REASONS HE WAS IN JAIL?

A. YES, SIR.

Q. CAN YOU TELL US WHAT HE TOLD YOU?

[1492] A. HE TOLD ME ABOUT THE NIGHT THAT IT HAPPENED. HE TOLD ME THAT HE WENT TO THE STORE TWO OR THREE TIME PREVIOUSLY BEFORE THE ROBBERY AND MURDER HAPPENED. I TALKED TO BOTH OF THEM, SO IT WAS LIKE TWO DIFFERENT STORIES.

Q. TALKED TO BOTH WHO?

A. ADAM MULLINAX AND WESLEY. HE SAID THE NIGHT IT –

THE COURT: HE WHO?

A. WESLEY SHAFER. WESLEY SAID THAT THE NIGHT THE ROBBERY WAS COMMITTED OR WHATEVER HIM AND PORTER, JUSTIN PORTER I BELIEVE, WENT TWO OR THREE TIMES TO THE HOT SPOT AND THEN WENT BACK TO CHESTER AND PICKED UP ADAM MULLINAX.

Q. OKAY, GO AHEAD.

A. THEY WENT BACK TO THE STORE. WESLEY AND JUSTIN WENT IN. ADAM WENT IN TO USE THE BATHROOM, AND THEN COME BACK OUT AND SAT

IN THE TRUCK. I DON'T KNOW WHERE JUSTIN WENT, BUT WESLEY ASKED FOR A PACK OF MARLBORO LIGHTS, AND WHEN THE CLERK PUT THE PACK OF MARLBORO LIGHTS ON THE DESK, HE PULLED THE GUN OUT AND RAY BROOME WAS WRITING ON THE CLIP BOARD, SOMETHING ABOUT THE CLIP BOARD; HE LOOKED AT THE GUN, AND THEN HE LOOKED BACK DOWN AS IF HE DIDN'T EVEN SEE IT, YOU KNOW, JUST SAYING LIKE –

THE COURT: WHEN YOU SAY "HE", USE SOMEBODY'S NAME, EITHER SHAFER OR BROOME BECAUSE YOU KEEP GOING BACK AND FORTH AND IT'S HARD TO FOLLOW WHAT YOU'RE TELLING US. INSTEAD OF SAYING HE LOOKED UP, SAY BROOME LOOKED UP.

[1493] Q. HE SAW THE GUN, HE LOOKED UP, AND THEN BROOME LOOKED BACK DOWN. WESLEY TOOK IT – THIS IS WHAT HE TOLD ME, I WASN'T THERE – BUT HE TOOK IT LIKE A SMART COMMENT OR WHATNOT, AND THEN SHOT HIM.

Q. SO, HE WAS OFFENDED HE SAID BY SOME –

MR. NETTLES: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION. THERE WASN'T ANY TESTIMONY ABOUT THAT. REPHRASE YOUR QUESTION.

Q. WHAT WAS WESLEY SHAFER, WHEN HE WAS TALKING TO YOU AND RELATING THIS, WHAT WAS HIS DEMEANOR?

A. HIS DEMEANOR, WHAT DO YOU MEAN?

Q. I MEAN HOW DID HE ACT?

A. HE ACTED LIKE IT DIDN'T EVEN BOTHER HIM.

Q. AT ANY POINT IN TIME DID YOU DISCUSS OR DID WESLEY SHAFER DISCUSS THE DEATH PENALTY WITH YOU?

A. YES, HE DID.

Q. AND AT ANY POINT IN TIME DID HE HAVE OCCASION TO TELL YOU WHAT HE THOUGHT OF THE DEATH PENALTY?

MR. NETTLES: OBJECTION.

THE COURT: THIS IS MR. SHAFER?

MR. BRACKETT: YES, SIR.

THE COURT: WHAT'S THE GROUNDS OF YOUR OBJECTION?

MR. NETTLES: WELL, IT MAY BE PROPER REPLY FIRST OFF. SECONDLY, IT'S HEARSAY; IT'S AN UNSWORN OUT OF COURT STATEMENT.

[1494] **THE COURT:** BY WHO?

MR. NETTLES: BY WESLEY SHAFER, BUT IT'S NOT A STATEMENT AGAINST INTEREST.

MR. BRACKETT: MAYBE WE SHOULD TAKE IT UP OUT OF THE PRESENCE OF THE JURY, YOUR HONOR.

THE COURT: YES. LET ME LET YOU GO TO THE JURY ROOM FOR A FEW MINUTES.

* * *

[1498] **THE COURT:** BRING IN THE JURY.

IN THE PRESENCE OF THE JURY:

THE COURT: YOU MAY CONTINUE.

MR. BRACKETT: YOUR HONOR, I WILL WITHDRAW MY LAST QUESTION. I HAVE NO FURTHER QUESTIONS OF THIS WITNESS. PLEASE ANSWER ANY QUESTIONS THAT COUNSEL FOR THE DEFENSE MAY HAVE.

CROSS EXAMINATION BY

MR. ALL:

Q. ROBERT, LET ME ASK YOU A FEW MORE QUESTIONS. YOU TALKED ABOUT WHAT YOU AND WESLEY TALKED ABOUT WHEN YOU WERE IN JAIL FOR WHAT, I THINK DUI THIRD, HABITUAL OFFENDER, DUI THIRD?

A. DUI THIRD.

Q. DID WESLEY SEND YOU A LETTER AFTER YOU GOT OUT OF JAIL?

A. YES, HE DID.

Q. WHAT DID THAT LETTER SAY?

A. HE JUST PRETTY MUCH SAID "STAY OUT OF TROUBLE; DON'T DRINK AND DRIVE." I REMEMBER ONE SENTENCE IN THERE, HE SAID "DON'T DRINK AND DRIVE; DON'T DRINK BECAUSE LOOK WHAT HAPPENED TO ME".

Q. DID HE APOLOGIZE ABOUT ANYTHING?

[1499] A. HE APOLOGIZED ABOUT –

MR. BRACKETT: YOUR HONOR, I OBJECT; THIS IS SELF-SERVING HEARSAY, AND IT'S NOT ANYTHING THAT'S UNDER THE EXCEPTION TO THE HEARSAY RULE.

THE COURT: I OVERRULE THE OBJECTION. GO AHEAD AND ASK THE QUESTION.

Q. DID WESLEY APOLOGIZE FOR ANYTHING?

A. YES, SIR, HE DID.

Q. WHAT DID HE APOLOGIZE FOR?

A. HE APOLOGIZED TO MY GIRLFRIEND BECAUSE SHE WAS A FRIEND OF RAY BROOME'S. HE APOLOGIZED ABOUT THAT.

Q. FOR SHOOTING HIM?

A. UH HUH.

Q. THANK YOU, ROBERT.

MR. BRACKETT: NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: YOU CAN STEP DOWN, AND BE EXCUSED. THOSE OF YOU ON THE JURY PANEL HAVE BEEN IN AND OUT, WE HAVE NOT. SO, WE ARE GOING TO TAKE ABOUT A 10 MINUTE BREAK.

AFTER THE BREAK:

THE COURT: IS THE STATE READY?

MR. POPE: THE STATE IS READY, YOUR HONOR.

THE COURT: THE DEFENSE?

MR. BANKS: THE DEFENSE IS READY, YOUR HONOR.

THE COURT: BRING THE JURY BACK IN.

IN THE PRESENCE OF THE JURY:

[1500] **THE COURT:** CALL YOUR NEXT WITNESS.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, THE STATE WOULD CALL JOHN BAILEY TO THE STAND.

JOHN M. BAILEY, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. POPE:

Q. OFFICER BAILEY, IF YOU WOULD, STATE YOUR NAME AND OCCUPATION FOR THE JURY PLEASE.

A. JOHN MARTIN BAILEY, JAILER AT THE UNION COUNTY JAIL, SHERIFF'S OFFICE.

Q. CAN YOU TELL THE JURY HOW LONG YOU HAVE BEEN EMPLOYED WITH THE UNION COUNTY JAIL?

A. ABOUT A YEAR AND A HALF.

Q. AND COULD YOU TELL THE JURY WHERE THE JAIL IS CURRENTLY LOCATED?

A. ON JONESVILLE HIGHWAY RIGHT NEXT TO THE CHAIN GANG.

Q. PRIOR TO OPENING THAT NEW JAIL, WHERE WAS IT PREVIOUSLY LOCATED?

A. AT THE CITY POLICE DEPARTMENT.

Q. BEHIND THE COURTHOUSE?

A. YES, SIR.

Q. I'LL CALL YOUR ATTENTION BACK TO THE EVENING OF APRIL 13TH, 1997. WERE YOU WORKING THAT EVENING?

A. YES, SIR, I WAS.

[1501] Q. DID THERE COME AN OPPORTUNITY AFTER OFFICER CUDD HAD TRANSPORTED THE DEFENDANT THAT YOU WERE IN THE DEFENDANT'S PRESENCE IN THE JAIL OVER THERE?

A. YES, I WAS.

Q. WOULD YOU RELATE TO THE JURY HOW THAT TOOK PLACE?

A. THEY BROUGHT MR. SHAFER IN, THEY DRESSED HIM OUT, PUT HIM IN A CONFERENCE ROOM, AND THEY TOLD ME TO HAVE A SEAT IN THERE WITH HIM UNTIL THEY GOT BACK, TO WATCH HIM FOR A WHILE. WHILE I WAS SITTING IN THERE WITH HIM, HE JUST COME UP AND ASKED ME, ASKED ME A STATEMENT WAS HIS FATHER

GOING TO GET HIS PISTOL BACK. AND THAT'S ABOUT IT.

Q. DID YOU THREATEN HIM IN ANY WAY OR PROMISE HIM ANYTHING?

A. NO, SIR, I DIDN'T.

Q. DID YOU QUESTION HIM ANY PRIOR TO THAT OR AFTER THAT?

A. NO, SIR.

Q. WHAT WAS HIS DEMEANOR; HOW DID YOU OBSERVE HIM WHEN HE ASKED YOU THAT QUESTION?

A. HE WAS JUST SITTING THERE CALM; JUST SITTING AROUND, NOTHING ELSE.

Q. THANK YOU. ANSWER ANY QUESTIONS THE DEFENSE HAS.

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[1615] **DR. J. PATRICK GOLDSMITH, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

DIRECT EXAMINATION BY

MR. NETTLES:

Q. DR. GOLDSMITH, DID YOU HAVE AN OPPORTUNITY TO MEET WITH MR. WESLEY SHAFER?

A. I DID.

Q. AND WHEN WOULD HAVE BEEN THE FIRST TIME YOU HAD AN OPPORTUNITY TO MEET WITH HIM?

A. HE WAS REFERRED TO ME IN AUGUST OF '96 BY THE HAZEL PITTMAN CENTER. HE WAS INVOLVED WITH A STATE AGENCY BECAUSE OF A CRIMINAL CHARGE OF SEXUAL MISCONDUCT.

[1616] Q. AND WHY WAS HE SENT TO YOU?

A. I DO A LOT OF WORK IN THAT AREA, AND HAVE HAD TRAINING IN THAT AREA.

Q. I MEAN WHAT WERE YOU INITIALLY LOOKING FOR WHEN HE WAS SENT TO YOU?

A. WHAT THEY WERE TRYING TO FIND OUT, THEY DID NOT DO WORK IN THAT AREA. AFTER INITIAL ASSESSMENT, THEY HAD SENT HIM THERE TO DETERMINE –

Q. SENT HIM FROM WHERE?

A. PROBATION SENT HIM TO HAZEL PITTMAN.

Q. WHAT IS HAZEL PITTMAN?

A. HAZEL PITTMAN IS A LOCAL ALCOHOL AND DRUG ABUSE COMMISSION, BUT THEY ALSO DO A LOT OF CORPORATE REFERRALS; THEY DO ASAP, ALCOHOL AND DRUG SAFETY PROGRAM WHICH IS FOR DUI'S, SO THEY REFERRED HIM OUT BECAUSE THEY FELT LIKE THAT PARTICULAR CENTER WAS NOT WHAT HE NEEDED FOR THAT OFFENSE; THAT HE NEEDED A SPECIALIST.

Q. WHAT WAS THAT OFFENSE?

A. SEXUAL MISCONDUCT.

Q. WAS IT CSC WITH A MINOR?

A. YES.

Q. NOW, TELL THE JURY A LITTLE BIT ABOUT YOUR TRAINING?

A. MY UNDERGRADUATE DEGREE IS IN PSYCHOLOGY AT PRESBYTERIAN COLLEGE; MY MASTERS IN COUNSELING PSYCHOLOGY WAS FROM THE UNIVERSITY OF GEORGIA. I HAVE BEEN LICENSED TO [1617] PRACTICE FOR 20 YEARS.

Q. LICENSED IN WHAT?

A. COUNSELING PSYCHOLOGY.

Q. HAVE YOU JUST RECENTLY RECEIVED A –

MR. POPE: MAY IT PLEASE THE COURT, THE STATE WOULD STIPULATE THAT HE IS AN EXPERT IN COUNSELING PSYCHOLOGY.

THE COURT: I FIND HE IS SO QUALIFIED. THIS WILL BE ANOTHER EXPERT LIKE I TALKED TO YOU ABOUT BEFORE.

Q. THANK YOU. NOW, WHEN YOU FIRST MET WITH WESLEY YOU SAY IT WAS FOR A SEXUAL MISCONDUCT CHARGE?

A. THAT IS CORRECT.

Q. AND WHAT WERE YOU ASKED TO DETERMINE AT THAT TIME?

A. ONE THING THEY WANTED TO KNOW IS WHETHER OR NOT THERE WAS A PROBLEM THAT COULD BE – IF THERE WAS GOING TO BE REPEATED

PROBLEMS IN REGARD TO THE SEXUAL MISCONDUCT, IF THERE WAS A DIAGNOSIS OF LIKE A PEDOPHILE OR SOMETHING LIKE THAT.

Q. IS THAT SOMETHING THAT YOU ARE QUALIFIED TO DETERMINE?

A. I WORK A LOT WITH THAT, YES.

Q. WHAT WAS YOUR DIAGNOSIS OF THAT PARTICULAR PROBLEM?

A. THAT WAS NOT THE PARTICULAR PROBLEM. WHAT HAPPENED –

Q. I'M SORRY, WHAT WAS NOT THE PARTICULAR PROBLEM?

A. THE SEXUAL MISCONDUCT. THAT WAS A SITUATION IN WHICH IT WAS CONSENSUAL. THERE WERE OTHER PROBLEMS THAT WERE FOUND THOUGH INITIALLY.

[1618] Q. WHAT DID YOU FIND OUT?

A. HE ACKNOWLEDGED INITIALLY THAT THERE WERE PROBLEMS. THE CLOSEST THAT HE WOULD COME IS THAT IT WAS AN AUTHORITY TYPE, HE DID ACKNOWLEDGE THAT, BUT HE WAS UNABLE TO DEAL WITH THAT IN ANY DEPTH.

Q. IS THAT UNUSUAL?

A. NOT AT ALL. HE WAS ALSO NON-COMPLIANCE IN COMING IN FOR TREATMENT.

Q. WHAT DOES THAT MEAN?

A. HE DID NOT SHOW UP FOR APPOINTMENTS; HE DID NOT CALL; ALL OF THAT.

Q. IS THAT UNUSUAL?

A. NOT IN THE COURTS – NOT AFTER REFERRAL FROM PROBATION AND PAROLE. THE FIRST THING YOU LOOK FOR IS WHETHER THERE IS AN UNDERLYING PROBLEM OF ALCOHOL OR DRUG ABUSE. AND I TALKED TO HIM ABOUT THAT; HE DENIED THAT. OF COURSE, HE WAS COMING FROM HAZEL PITTMAN, BUT HE DENIED THAT THERE AND SUBSEQUENTLY LATER WHEN I SAW HIM IN THE JAIL, HE ADMITTED TO DRUG ABUSE TO AN ADDICTIVE LEVEL.

Q. AT WHAT?

A. AT AN ADDICTIVE LEVEL.

Q. WHAT CAN THAT BE A SIGNAL FOR YOU?

A. AT AN ADDICTIVE LEVEL THERE IS GOING TO–BE PROBLEMS IN REGARD TO IMPULSE CONTROL. WHAT HAPPENED IS THAT OVER PROGRESSION THERAPY IT CAME EVIDENT THAT THERE WERE [1619] ALSO UNDERLYING PROBLEMS THAT HE WAS ATTEMPTING TO MASK.

Q. WHAT DO YOU MEAN BY "MASK"?

A. THAT HE WOULD TALK ABOUT THE ABUSE THAT HAS BEEN COVERED HERE.

Q. WHAT ABUSE?

A. BY HIS FATHER. BUT WHEN HE TALKED ABOUT IT, IT WAS WHAT I CALL WORDS WITHOUT AFFECT.

Q. WHAT DOES THAT MEAN?

A. THE EMOTIONAL COMPONENT WAS NOT THERE.

Q. WHAT DO YOU MEAN BY THE EMOTIONAL COMPONENT WAS NOT THERE?

A. THAT MEANS THAT WHEN HE TALKS ABOUT IT, HE TALKS ABOUT THE ABUSE AS IF HE WERE READING IT IN A NEWSPAPER OR SOMETHING. WHAT HAPPENS IS THAT'S GENERALLY A SITUATION THAT'S OVER A LONG PERIOD OF TIME THAT SOMEONE HAS LEARNED TO PUSH THOSE EMOTIONS BACK. AND, OF COURSE, THE ALCOHOL AND DRUGS GIVE HIM THE ABILITY TO THAT EVEN MORE.

Q. GIVE HIM THE ABILITY TO DO WHAT?

A. PUSH THE EMOTIONS DOWN. IF THE ADDICTION IS A DISEASE, IT WILL BE MORE DIFFICULT TO GET THEIR FEELINGS OUT. THE PROBLEM IS THAT HE KEEPS IT DOWN.

Q. KEEPS WHAT DOWN?

A. THE EMOTIONS, SO THAT WHAT HAPPENS IS THAT THEIR IMPULSE CONTROL PROBLEMS BECOME EVEN MORE SEVERE.

[1620] Q. WHAT CAUSES IMPULSE CONTROL PROBLEMS?

A. THE EMOTIONS THAT ARE NOT DEALT WITH. BASICALLY IT BECAME EVIDENT THAT THERE WERE TWO PROBLEMS THAT WERE GOING ON. THIS WAS NOT IN THERAPY, THIS WAS ONLY AFTER HE WAS SEEN AT THE JAIL.

Q. LET'S TALK ABOUT THAT FOR JUST A SECOND IF YOU DON'T MIND. WHEN IS THE FIRST TIME THAT YOU WERE ABLE TO DETERMINE THAT THERE MAY BE SOME PROBLEMS ARISING FROM ABUSE AS IT RELATED TO WESLEY?

A. THAT WAS AROUND – I SAW HIM FOR A TOTAL OF SEVEN TIMES AND ABOUT THE THIRD OR FOURTH TIME IT WAS EVIDENT THAT THAT WAS GOING ON BECAUSE OF WHAT I DESCRIBED. IN OTHER WORDS, THE WAY THAT HE DEALT WITH IT. AND WHAT HAPPENED IS THAT FROM THAT POINT ON, THAT'S WHEN HE BECAME MORE NON-COMPLIANT WITH TREATMENT WHICH IS NOT UNUSUAL.

Q. BEFORE OR AFTER YOU STARTED TO TALK ABOUT THAT?

A. AFTER WE STARTED TO TALK ABOUT THAT.

Q. IS THAT UNUSUAL FOR SOMEONE, ONCE YOU START TO TOUCH ON THIS ABUSE, TO BECOME NON-COMPLIANT?

A. NOT AT ALL.

Q. DOES THAT HOLD TRUE WITH JUST REGULAR PEOPLE COMING IN TO SEE YOU?

A. IT HOLDS TRUE WITH PEOPLE WHO HAVE JUST ABUSE AND NOT ADDICTION. WHEN THEY HAVE BOTH, IT IS A DUAL DISORDER. AND BY THAT WHAT HAPPENS IS IT MEANS THEY HAVE A GREATER [1621] CHANCE OF RELAPSE AS FAR AS ADDICTION, AND THEY ALSO WILL COMPLICATE THE TREATMENT BECAUSE THE ADDICTION KEEPS THAT DOWN, ALL OF THE EMOTIONS. AND YOU

CANNOT TREAT PHYSICAL ABUSE WITHOUT ACCESSING THEIR EMOTIONS. THAT IS ONE OF THE COMPONENTS THAT YOU HAVE TO GET TO. SO, THEY HAVE TO BE CLEAR OF ALCOHOL AND DRUGS TO BE TREATED.

Q. SO, LET ME ASK YOU THIS THEN. WHEN YOU FIRST REALIZED THAT THERE WAS SOME EVIDENCE OF ABUSE, WAS THAT BEFORE OR AFTER THE CHARGES FOR WHICH WESLEY IS ON TRIAL NOW?

A. IT WAS BEFORE THE CHARGES.

Q. AND WHEN IS THE FIRST TIME THAT HE TOLD YOU ABOUT ANY ABUSE AT THE HANDS OF HIS FATHER?

A. THE FIRST TIME – I'LL HAVE TO LOOK BACK AT MY NOTES, BUT I WANT TO SAY THAT IT WAS PROBABLY IN SEPTEMBER OF '96 OR RIGHT ABOUT IN THERE.

Q. AND WAS THAT BEFORE OR AFTER THIS CHARGE?

A. THAT WAS BEFORE THIS CHARGE.

Q. SO, WHAT WAS ONE OF THE FIRST THINGS HE TOLD YOU ABOUT THE ABUSE FROM HIS FATHER?

A. I THINK HE TALKED ABOUT, AND I WOULD HAVE TO LOOK BACK, I THINK HE TALKED ABOUT THE INCIDENT OF THE 911. HE HAD INDICATED, I THINK BUT I'M NOT SURE, THAT WAS THE TIME THAT HE INDICATED THAT HIS FATHER BROKE A PADDLE ON HIM. AND THEN LATER GOT INTO

LEAVING BRUISES THAT WERE SEEN [1622] BY A KINDERGARTEN TEACHER. IT'S VERY IMPORTANT THE WAY THAT THAT COMES UP.

Q. WOULD YOU SHARE THAT WITH ME?

A. BECAUSE IT IS DEPRESSED AND SUPPRESSED, AND I THINK THAT THAT IS TRUE OF THE ENTIRE FAMILY BECAUSE IT'S A HISTORY OF ABUSE THAT GOES BACK TO THE ENTIRE FAMILY. SO, THAT PART OF WHAT HAPPENS IS THAT THERE IS A TENDENCY FOR FAMILY MEMBERS NOT TO SEE IT.

Q. WHY WOULD THERE BE A TENDENCY IN A FAMILY WHERE THERE HAS BEEN A HISTORY OF ABUSE FOR THEM NOT TO SEE THE ABUSE?

A. BECAUSE WHAT HAPPENS IS THAT IF THEY HAVE NOT DEALT WITH THEIR OWN ABUSE, THEN WHAT HAPPENS IN DEALING WITH HIS ABUSE AFTER ALL OF THE EMOTIONS AND THINGS THAT GOES ON, THERE'S A TERM CALLED BLINDNESS WHICH MEANS THAT SOMEONE CAN ACTUALLY SEE THE ABUSE, AND THEN JUST BLOCK IT OUT.

Q. IS THAT UNCOMMON FOR SOMEONE WHO HAS BEEN ABUSED TO TRY TO BLOCK OUT THE ABUSE?

A. IT IS NECESSARY FOR THEIR SURVIVAL AT THAT TIME.

Q. WHY IS IT NECESSARY FOR THEIR SURVIVAL?

A. A LOT OF RESEARCH, A LOT THAT IS DONE AT THE SOUTH CAROLINA CRIMINAL RESEARCH

CENTER INDICATES THAT AT THE TIME OF THE ABUSE, THE TYPE OF ABUSE THAT HAS BEEN DESCRIBED, THAT WHAT HAPPENS IS THAT IT IS A SITUATION WHERE A PERSON BELIEVES THAT HE IS GOING TO DIE, IT [1623] CHANGES THEIR WORLD VIEW.

Q. WHY DOES IT CHANGE THEIR WORLD VIEW, AND MAKE THEM BELIEVE THEY ARE GOING TO DIE?

A. BECAUSE WHAT HAPPENS IS THAT WHEN IT HAPPENS AT AN EARLY AGE LIKE THAT WHAT GOES ON IS THAT THEY DID NOT KNOW THE WHOLE SYSTEM OF THE PHYSIOLOGICAL CHANGES THAT WOULD OCCUR.

Q. WHAT PHYSIOLOGICAL CHANGES?

A. PHYSIOLOGICAL CHANGES THAT OCCUR INSIDE OF THEM THAT THEIR ENTIRE ADRENAL SYSTEM IS ACTIVATED; THAT'S PART OF P.T.S., THE POST TRAUMATIC STRESS DISORDER SYNDROME. AND THAT WOULD, I'M SURE, BE WHAT BOTH WESLEY AND HIS SISTER WOULD HAVE GONE THROUGH DURING THAT PERIOD OF TIME. SO, THERE IS THAT COMPONENT, AND THEN THERE IS THE DEPRESSIVE COMPONENT.

Q. WHEN YOU SAY DEPRESSIVE COMPONENT, WHAT DO YOU MEAN BY THAT?

A. PART OF WHAT HAPPENS IS THAT WHEN YOU TALK TO WESLEY ABOUT THINGS LIKE THAT, THE WORDS WITHOUT AFFECT, THAT THERE IS A DEPRESSION THAT SERVES TO TRY TO KEEP ALL OF

THAT PAIN AWAY. AND THEIR IDEA IS THAT THE DEPRESSION DISTRIBUTES THE PAIN OVER TIME. THAT'S ONE OF THE REASONS FOR THE DEPRESSIVE DISORDER. THERE'S BEEN A LOT OF RESEARCH ON THAT.

Q. DID YOU MAKE ANY DIAGNOSIS ON WESLEY AS IT RELATES TO [1624] DEPRESSION?

A. YES. FROM THE HISTORY AND ALL OF THAT I BELIEVE HE HAS AN UNDERLYING PROBLEM WITH DEPRESSION WHICH ALSO AT TIMES MAJOR DEPRESSION, AND IN HIS EARLY CHILDHOOD IN ALL PROBABILITY HE HAD POST TRAUMATIC STRESS DISORDER.

Q. WAS THERE ANY OTHER HISTORY OF THIS TYPE IN HIS FAMILY?

A. YES, THERE WAS. WITHIN THE FAMILY I THINK THAT THERE ARE UNCLES - I KNOW HIS SISTER HAS ALREADY INDICATED THAT THERE IS DEPRESSION WITH THAT.

Q. HOW DOES DEPRESSION EFFECT - HOW DID IT AFFECT WESLEY?

A. WELL, ONE OF THE THINGS IS THAT PART OF WHAT HAPPENS IS THAT THERE ARE NON-COMPLIANCE PROBLEMS. GENERALLY THERE ARE GOING TO BE NON-COMPLIANCE PROBLEMS WITH DEPRESSION.

Q. WHY IS THAT?

A. BECAUSE WHAT HAPPENS IS THE EMOTIONS ARE MOTIVATORS AND YOU DON'T WANT TO

DISCUSS THOSE THINGS. PLUS IF YOU ARE IN A SITUATION IN WHICH YOU CANNOT LET YOUR ANGER OUT, THEN ONE OF THE WAYS OF GETTING BACK WOULD BE BY BEING PASSIVE AGGRESSIVE, BY NOT FOLLOWING THROUGH.

Q. WHAT'S PASSIVE AGGRESSIVE?

A. BY SIMPLY NOT FOLLOWING THROUGH. IN OTHER WORDS, THERE WOULD BE A LIST OF DUTIES THAT WOULD NEED TO BE OCCURRING IN THE HOUSEHOLD, SO WHAT WOULD HAPPEN IS THAT BECAUSE YOU COULD NOT TAKE ON THE AUTHORITY FIGURE, WHAT HAPPENS IS YOU WOULD SIMPLY NOT COMPLY, AND THAT IS ONE [1625] OF THE WAYS YOU CAN AT LEAST HAVE SOME FEELING.

Q. LET ME ASK YOU, WHAT IS THE DIFFERENCE BETWEEN OTHERWISE RELATIVELY, YOU KNOW, PSYCHOLOGICALLY NORMAL PERSONS SAYING I'M FEELING DEPRESSED AND SOMEONE WHO IS SUFFERING FROM STYMIED DEPRESSION. WHAT'S THE DIFFERENCE BETWEEN THOSE TWO?

A. THE STYMIED NEVER GOES AWAY WOULD BE THE BEST DESCRIPTION OF IT. IT IS GOING TO BE THERE, AND AT TIMES IT WOULD BE MAJOR AND WOULD AFFECT ALL AREAS OF HIS LIFE. AND TYPICALLY WITH POST TRAUMATIC STRESS DISORDER ALSO THERE CAN BE IMPULSE CONTROL PROBLEMS IN ACTING OUT THEIR ANGER.

Q. WAS THERE ANGER IN WESLEY SHAFER THAT YOU FOUND?

A. YES.

Q. WHAT DID YOU FIND WAS THE SOURCE OF THAT?

A. THE ABUSE.

Q. AND SPECIFICALLY WHAT ABUSE WERE YOU ABLE TO FIND THAT YOU FEEL WAS THE SOURCE OF THAT ANGER?

A. THE ABUSE ON THE PART OF HIS DAD WHICH I THINK HAS BEEN, YOU KNOW, REITERATED HERE.

Q. NOW, WHAT DID YOU DO TO INSURE OR WHAT ABOUT YOUR TREATMENT BROUGHT YOU TO THE CONCLUSION THAT THE ABUSE DID IN FACT HAPPEN?

A. I DO NOT BELIEVE THAT THE ABUSE IS FAKED BY WESLEY.

Q. YOU DON'T THINK IT IS WHAT?

[1626] A. THAT IT IS FAKED. I DON'T BELIEVE THAT HE MADE THAT UP.

Q. WHY IS THAT?

A. THE WAY IT WAS PRESENTED. THAT TYPICALLY IN SITUATIONS OF ABUSE WHAT HAPPENS IS THAT THE CHILD WILL TAKE ON MORE RESPONSIBILITY FOR THE ABUSE.

Q. WHAT DO YOU MEAN BY THAT, TAKE ON MORE RESPONSIBILITY?

A. THEY WILL BLAME THEMSELVES. AND ONE OF THE REASONS THAT PEOPLE DO THAT IS

BECAUSE TO LIVE IN THE ENVIRONMENT THAT IS LIKE A WAR ZONE, IT IS DIFFICULT TO DO THAT, YOU CAN'T DO THAT, AND YOU CAN'T LIVE WITH A VIEW OF YOUR DAD AS A GOOD DAD AND A BAD DAD. AND IF YOU ALSO ARE BEING TOLD THAT EVERYTHING IS YOUR FAULT, THEN TO ESCAPE IT WHAT HAPPENS IS YOU TAKE THAT ON. IF YOU TAKE IT ON, THEN YOU BELIEVE THAT YOU HAVE SOME CONTROL OVER IT, SO MAYBE IF I'M A BETTER PERSON - WHEN HE STARTS TALKING ABOUT IT, THERE IS NOT ENOUGH BLAME PLACED ON THE FATHER. SO, WHEN HE STARTS TALKING ABOUT IT, THERE WOULD BE A CLASSIC SYMPTOM IN THAT HE WOULD BLAME HIMSELF AND SAY, WELL, I WAS A BAD KID. OR HE BECOMES PASSIVE, AND WILL NOT TALK ABOUT IT. SO, HOW HE PRESENTED IT WAS REAL IMPORTANT AS FAR AS BEING BELIEVABLE.

ALSO, THAT WAS TRUE OF HIS SISTER AND HIS MOTHER IN THAT ON A NUMBER OF OCCASIONS I TRIED TO GET THEM TO TALK ABOUT IT, AND JUST TO WRITE ABOUT IT BECAUSE IT WAS [1627] NECESSARY FOR HIS TREATMENT. BUT IT WAS NOT SOMETHING THAT THEY COULD DO.

Q. THAT THEY COULD DO?

A. THEY COULDN'T DO.

Q. OKAY. WAS THERE A TIME THAT YOU ASKED FOR WESLEY'S PARENTS' ASSISTANCE IN YOUR COUNSELING?

A. I DID.

Q. AND WHAT WAS THE ASSISTANCE THAT YOU ASKED FOR FROM HIS PARENTS?

A. AFTER WRITING TWO OR THREE LETTERS TO PROBATION AND PAROLE INDICATING THAT HE WAS NOT COMPLYING, AND THAT I WAS VERY CONCERNED ABOUT HIM, I ASKED HER IF SHE WOULD BE WILLING TO COME IN BECAUSE I NEEDED TO TALK WITH HER ABOUT SOME THINGS THAT HAD COME UP, AND I FELT LIKE SHE MAY HAVE MORE HISTORY.

Q. WHAT WERE YOU PLANNING ON TALKING TO HER ABOUT?

A. ABOUT THE ABUSE.

Q. AND WHEN YOU CONFRONTED HER WITH THE ABUSE, AND ASKED HER TO COME IN, DID SHE COME IN?

A. SHE TOLD ME AT THAT TIME THAT THEY HAD BEEN THROUGH SO MUCH WITH WESLEY THAT SHE WOULD RATHER FOR HIM TO CARRY ON THE COUNSELING ON HIS OWN.

Q. WELL, DID YOU EVER HAVE AN OPPORTUNITY TO TALK WITH HIS FATHER?

A. NO, I DID NOT.

[1628] Q. WHAT DID YOU ULTIMATELY DETERMINE WAS THE BASIS FOR WESLEY'S PROBLEM, FOR LACK OF A BETTER WORD.

A. THE BASIS FOR HIS PROBLEM, I BELIEVE, WAS THE TRAUMA, THE PHYSICAL ABUSE THAT HE

HAD ENDURED AS A CHILD, AND NOT ONLY HAD NOT DEALT WITH, BUT HAD USED ALCOHOL AND DRUGS IN ORDER NOT TO DEAL WITH IT,

Q. AND IS THE USE OF ALCOHOL AND DRUGS, I MEAN IS IT COMMON TO SEE THAT IN A PERSON WHO HAS BEEN ABUSED?

A. IT IS BECAUSE THEY BASICALLY KEEP ALL THE ANGER AND ALL THEIR EMOTIONS DOWN AND WHAT YOU END UP WITH IS A SITUATION WHERE YOU'VE GOT WHEN THEY DO COME OUT, THEY COME OUT WITH A VENGEANCE. AND THAT'S WHAT HAPPENED WITH WESLEY.

Q. HOW DOES ALCOHOL AND DRUGS HELP SOMEONE TO SUPPRESS THEIR ANGER?

A. ALCOHOL SUPPRESSES FEELINGS, AND IT WORKS FOR A SHORT PERIOD OF TIME. WHAT HAPPENS IN A 24 TO 48 HOUR PERIOD THEN THERE IS A GREATER INCREASE OF ANXIETY, AND THEN WHEN YOU GET TO AN ADDICTIVE LEVEL WHICH HE WAS AT, THEN WHAT HAPPENS IS YOU'RE THEN VERY, VERY PRONE TO PERIODS OF EXTREME EXPLOSIVENESS. THE POTENTIAL IS THERE BECAUSE THERE IS NO CONTROL OVER THE IMPULSES AT THE LEVEL OF ADDICTION THAT HE HAD.

Q. NOW, WHEN IS THE LAST TIME THAT YOU SAW WESLEY SHAFER, YOU KNOW, OBVIOUSLY BEFORE YOU CAME TO THE COURTROOM [1629] TODAY?

A. THE LAST TIME I SAW HIM WAS IN OCTOBER OF THIS YEAR IN JAIL, '97.

Q. AND WHAT DID HE SHARE WITH YOU AT THAT TIME?

A. AT THAT TIME HE BEGAN TO TALK ABOUT THE EXTENT OF THE ALCOHOL AND DRUG ABUSE THAT WAS GOING ON.

Q. IS THERE ANYTHING ABOUT WHAT HE TOLD YOU THEN THAT CAUSED YOU TO DOUBT ANYTHING THAT YOU FOUND BEFORE HE WAS ARRESTED?

A. NO. I BELIEVED WHAT HE WAS SAYING. HE TOLD ME ABOUT THE USAGE BACK IN MARYLAND. HE TOLD ME WHAT HE HAD USED IMMEDIATELY BEFORE THIS INCIDENT OCCURRED.

Q. WHAT DID HE TELL YOU HE USED?

A. HE HAD USED L.S.D.; HE HAD USED MARIJUANA; HE WAS DRINKING IMMEDIATELY PRIOR TO THAT. AND WHEN YOU PUT ALL OF THAT TOGETHER, IT'S A REAL EXPLOSIVE COMBINATION.

Q. PRIOR TO THE SHOOTING, THE MURDER THAT BROUGHT WESLEY SHAFER HERE, WHAT HELP DID YOU REQUEST FROM HIS PARENTS?

A. WELL, I HAD ASKED THEM TO – WELL, I MET WITH HIS MOTHER, AND ASKED HER TO SIT DOWN AND WRITE UP WHAT HAD HAPPENED TO WESLEY IN THE HOME. AND THE REASON I ASKED HER TO WRITE THAT UP IS BECAUSE IT IS SUCH A DIFFICULT PROCESS IF THERE HAS BEEN ABUSE WITHIN A FAMILY ORIGIN, AND EVEN IF THERE HASN'T BEEN IN HER FAMILY ORIGIN, JUST THE ABUSE THAT SHE HAS WITNESSED, THAT SHE WOULD TEND TO [1630]

KEEP IT OUT OF HER AWARENESS. IF THERE IS ABUSE OF WESLEY OR ABUSE OF JENNY, SHE WILL TRY TO KEEP THAT OUT OF HER MIND. ONE OF THE REASONS FOR HER WRITING ABOUT IT IS THAT WHAT HAPPENS IS THAT YOU CAN TALK TO SOMEONE ABOUT THAT, AND IT WILL BE GONE WITHIN FIVE MINUTES OF TALKING, BUT WRITING SORT OF LINKS IT TOGETHER AND GENERALLY WILL BRING UP A WHOLE RECOLLECTION OF INCIDENTS. THAT'S THE REASON I ASKED HER TO DO THAT, AND ALSO JENNY.

Q. IS WHAT YOU FOUND OUT FROM – WELL, ULTIMATELY FOUND OUT FROM WESLEY'S FAMILY, IS THAT CONSISTENT WITH A FAMILY WHERE THERE IS ABUSE?

A. YES.

Q. AND WHAT IS THE LONG TERM EFFECT ON A CHILD WHO HAS GROWN UP IN A HOUSEHOLD SURROUNDED WITH ABUSE?

A. WELL, THERE IS PLENTY OF EVIDENCE THAT INDICATES THAT IT DOES HAVE A LONG TERM EFFECT. THERE PROBABLY IS PSYCHIATRIC DISORDERS THAT ARE INCREASED, PROBABLY SUBSTANCE ABUSE DISORDERS INCREASE. THERE IS A GREAT DEAL OF INFORMATION ON THIS.

Q. WAS OR WERE YOUR FINDINGS AS THEY RELATED TO WESLEY SHAFER CONSISTENT WITH A CHILD WHO HAD GROWN UP IN A HOUSEHOLD OF ABUSE?

A. THEY WERE.

Q. I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

[1631] **THE COURT:** CROSS EXAMINATION?

CROSS EXAMINATION BY

MR. POPE:

Q. MR. GOLDSMITH, COULD YOU TELL ME WHAT INFORMATION YOU RELIED ON IN PRESENTING YOUR FINDINGS HERE TODAY?

A. WHAT INFORMATION?

Q. YES. CAN YOU TELL THE JURY WHERE YOU GOT THE DATA THAT YOU BASED YOUR OPINIONS ON?

A. THE INFORMATION THAT I GOT WAS FROM THE INTERVIEWS WITH WESLEY. THE M.M.P.I. TESTING; THE INTERVIEW WITH THE MOTHER. THERE WERE NO RECORD THAT WAS SENT FROM HAZEL PITTMAN.

Q. SO, YOU DIDN'T REVIEW ANY EVALUATIONS THAT HAD BEEN DONE UP IN MARYLAND?

A. NO.

Q. WOULD YOU AGREE WITH ME THAT THAT CERTAINLY COULD ASSIST IN GIVING YOU A MORE FULL EVALUATION?

A. YES. ANYTHING THAT IS AVAILABLE, IT WOULD BE A GOOD IDEA TO HAVE IT.

Q. BUT ANY DOCUMENTATION OR ANYTHING THAT WAS OUT THERE, YOU DIDN'T REVIEW THAT. YOU JUST TALKED WITH THEM AND DID YOUR OWN TESTING?

A. THAT'S CORRECT, I DID NOT HAVE THE BENEFIT OF ANYTHING ELSE.

Q. I TRIED TO WRITE DOWN THE CHRONOLOGY IF YOU COULD HELP [1632] ME. TELL THE JURY AGAIN WHEN YOU WERE FIRST INVOLVED WITH WESLEY SHAFER?

A. THAT WAS IN AUGUST OF '96.

Q. OKAY, DO YOU KNOW FROM YOUR INFORMATION FROM YOUR EVALUATION OF WHEN HE WAS FIRST REFERRED TO HAZEL PITTMAN?

A. I DO NOT HAVE WHEN HE WAS FIRST REFERRED TO HAZEL PITTMAN.

Q. I'LL SHOW YOU THIS DOCUMENT AND ASK YOU TO LOOK AT THAT, AND TELL ME IF THAT APPEARS TO BE ACCURATE?

A. 4-10-96 PROBATION REPORT OF RICK WILLIAMS.

Q. SO, WE'RE TALKING ABOUT THE SAME INCIDENT?

A. THAT'S RIGHT.

Q. I'LL SHOW YOU THIS DOCUMENT WHICH APPEARS TO BE A SIMILAR REFERRAL DOCUMENT AND ASK YOU IF YOU CAN IDENTIFY THAT?

A. INTAKE 2-29-96, ASSESSMENT 7-3-96, CASE MANAGEMENT 7-22-96. WESLEY IS INAPPROPRIATE FOR SERVICES AT OUR AGENCY AND THEY REFERRED HIM TO ME.

Q. IS THAT ACCURATE?

A. YES, EXCEPT FOR THE PIEDMONT MEDICAL.

Q. IT SAYS "PAT GOLDSMITH AT PIEDMONT MEDICAL IN ROCK HILL, SOUTH CAROLINA"?

A. YES. I WORK THERE ONE DAY A WEEK.

Q. YOU'RE ACTUALLY IN LANCASTER?

[1633] A. YES.

Q. YOUR HONOR, I WOULD HAVE THIS MARKED AS A STATE'S EXHIBIT.

MR. NETTLES: NO OBJECTION, YOUR HONOR.

THE COURT: IT WILL BE RECEIVED.

(THE REPORT WAS MARKED STATE'S EXHIBIT 56.)

Q. OKAY, DOCTOR, YOU READ THIS. I WANT YOU TO INDICATE TO THE JURY THE REFERRAL LANGUAGE FOR SEXUAL OFFENDER COUNSELING DUE TO HAVING NO ALCOHOL OR OTHER DRUG ABUSE - COULD YOU READ SPECIFICALLY THE REFERRAL LANGUAGE WHY HE WAS SENT TO YOU?

A. "WESLEY IS INAPPROPRIATE FOR SERVICES AT OUR AGENCY DUE TO HAVING NO REPORTED PROBLEMS WITH ALCOHOL AND OTHER DRUG ABUSE. WE REFERRED WESLEY FOR SEXUAL

OFFENDER COUNSELING TO PAT GOLDSMITH AT PIEDMONT MEDICAL IN ROCK HILL, S. C.".

Q. AND THEN IT WAS AUGUST OF '96 WHEN YOU FIRST SAW HIM; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. DID YOU SET UP A PROGRAM WITH YOUR OFFICE WITH HIM AT THAT TIME?

A. I DID.

Q. AND IN SEPTEMBER OF '96 DID YOU NOTIFY THEM THAT HE HADN'T COME TO ANY MORE COUNSELING FOR TREATMENT?

A. THAT'S CORRECT.

[1634] Q. I'LL SHOW YOU WHAT'S BEEN MARKED STATE'S EXHIBIT 57 FOR IDENTIFICATION, AND ASK IF YOU CAN IDENTIFY THIS?

A. THIS IS A LETTER THAT I SENT TO RICK WILLIAMS, DEPARTMENT OF PROBATION AND PAROLE, WHICH INDICATES WESLEY'S TREATMENT DEALING WITH SEXUAL ABUSE IS SCHEDULED FOR AUGUST 6 AND SEPTEMBER 2, 1996 AND HE WILL BE ATTENDING ON AN EVERY OTHER WEEK BASIS, AND HIS NEXT APPOINTMENT WAS SCHEDULED FOR SEPTEMBER 18TH. AND I THINK THERE ARE SEVERAL LETTERS THAT I SENT OUT AFTER THAT INDICATING THAT HE HAD FAILED TO SHOW UP FOR SEVERAL APPOINTMENTS.

Q. AND ON THIS PARTICULAR DOCUMENT YOU HAVE A HANDWRITTEN NOTE -

A. THAT SAYS "DID NOT SHOW FOR HIS APPOINTMENT".

Q. DID YOU DISCONTINUE HIM JUST FOR HIM MISSING ONE APPOINTMENT?

A. NO, HE WASN'T DISCONTINUED. PART OF WHAT HAPPENS IS - I THINK THAT WAS 9-18-96. HE CAME AGAIN ON 9-24, 10-9; HIS MOTHER INDICATED THAT HE COULD NOT COME FOR ONE APPOINTMENT; 11-27 HE FAILED TO SHOW FOR AN APPOINTMENT. SO, THERE WAS A CALL MADE TO PROBATION AND PAROLE ON 9-2-96 INDICATING THAT HE WAS NOT COMPLYING WITH THE TREATMENT.

Q. SO, THE DOCUMENT I HAVE MARKED STATE'S EXHIBIT 57 FOR IDENTIFICATION REALLY JUST REFERS TO ONE OF THE [1635] APPOINTMENTS HE MISSED, BUT THAT DOESN'T COVER THE WHOLE PICTURE?

A. NO.

Q. PRIOR TO THIS INCIDENT, ROUGHLY FROM AUGUST '96 ON UP THROUGH THE END OF '96 THAT'S WHEN YOU WERE SEEING HIM. YOU SAID THERE WERE SOME APPOINTMENTS HE DID COME TO?

A. RIGHT. THE LAST APPOINTMENT WAS 12-18-96. AT THAT TIME HE HAD BASICALLY INDICATED THAT THERE WERE NO PROBLEMS. I HAD BASICALLY TOLD HIM THERE WERE PROBLEMS. SUBSEQUENTLY HE INDICATED THAT HE WANTED TO PROVE THAT HE DIDN'T HAVE ANY PROBLEMS.

AND I SAID I'LL BE GLAD TO DO THAT IF WE CAN DO SOME TESTING. AND THAT'S WHEN THE TESTING OCCURRED AT THAT TIME.

Q. WHEN YOU SAY "AT THAT TIME", WHAT WAS THE DATE OF THAT TESTING?

A. 12-18-96.

Q. AND SUBSEQUENTLY ON 12-30-96 - I'LL SHOW YOU STATE'S EXHIBIT 58 FOR IDENTIFICATION AND ASK IF THIS IS A LETTER ON YOUR LETTERHEAD AND IN YOUR HANDWRITING?

A. THAT'S CORRECT.

Q. WOULD YOU TELL THE JURY WHAT THAT INDICATES?

A. IT INDICATES ON 12-18-96 HE HAD REQUESTED AN ASSESSMENT TO DETERMINE IF HE HAD A SEXUAL PROBLEM. HE WAS GIVEN THE T.A.T. AND D.A.P. TEST; HE WAS ALSO TO COMPLETE AND RETURN THE M.M.P.I. I ASKED HIS MOTHER TO COME IN TO [1636] COMPLETE SOME BACKGROUND INFORMATION; DISCUSSED WITH HIM THE CONSEQUENCES OF FAILURE TO FOLLOW THROUGH WITH COUNSELING IF THERE IS A DIAGNOSIS OF A SEXUAL PROBLEM; TO SET UP A PAYMENT PLAN FOR OUR OFFICE. WE FINALLY HAD TO - I THINK I HAD TO CALL HIM TO GET THE M.M.P.I., BUT WE FINALLY GOT THAT BACK.

Q. YOU WROTE ON HERE THAT "AS OF THIS DATE, HE HAS COMPLIED WITH NONE OF THESE".

A. THAT'S CORRECT.

MR. POPE: I WOULD MOVE STATE'S EXHIBIT 58 FOR IDENTIFICATION INTO EVIDENCE.

MR. BANKS: WITHOUT OBJECTION.

THE COURT: IT WILL BE RECEIVED.

(THE LETTER FROM DR. GOLDSMITH TO PROBATION AND PAROLE DATED 12-30-96 WAS MARKED IN EVIDENCE AS STATE'S EXHIBIT 58 WITHOUT OBJECTION.)

Q. I'LL SHOW YOU WHAT HAS BEEN MARKED AS STATE'S EXHIBIT 59 FOR IDENTIFICATION, IF YOU WOULD TAKE A LOOK AT THAT.

A. YES, THIS IS DATED 2-4-97, A HANDWRITTEN NOTE TO RICK WILLIAMS, HIS PROBATION OFFICER, THAT INDICATED HE HAD COMPLETED HIS EVALUATION, AND IS PRESENTLY NON-COMPLIANCE IN ALL OTHER AREAS ADDRESSED IN THE LETTER SENT TO YOU IN JANUARY.

Q. OKAY. WE WOULD OFFER THAT AS STATE'S EXHIBIT 59.

MR. BANKS: WITHOUT OBJECTION.

[1637] **THE COURT**: IT WILL BE RECEIVED.

(THE LETTER WAS MARKED STATE'S EXHIBIT 59 IN EVIDENCE WITHOUT OBJECTION.)

MR. POPE: YOUR HONOR,I HAD PREVIOUSLY MOVED STATE'S EXHIBIT 58 IN, I THINK THAT WAS WITHOUT OBJECTION. STATE'S EXHIBIT 57 WAS THE ONE THAT HE INDICATED ONLY SHOWED ONE MISSED APPOINTMENT, AND I DID NOT MOVE THAT

INTO EVIDENCE, BUT I WILL MOVE IT IN AT THIS TIME JUST FOR CONTINUITY.

THE COURT: ANY OBJECTION?

MR. NETTLES: WITHOUT OBJECTION.

THE COURT: IT WILL BE RECEIVED.

(STATE'S EXHIBIT 57 FOR IDENTIFICATION WAS MARKED IN EVIDENCE AS STATE'S EXHIBIT 57 WITHOUT OBJECTION.)

Q. DOCTOR, YOU INDICATED THAT HE CAME TO SEE YOU FOR SOME APPOINTMENTS; IS THAT CORRECT.

A. THAT'S CORRECT.

Q. APPROXIMATELY HOW MANY TIMES DID YOU SEE HIM PRIOR TO THIS CRIME?

A. I SAW HIM SIX TIMES PRIOR TO THE CRIME, AND ONE TIME AFTER THE CRIME.

Q. AND YOUR SEEING HIM AFTER THE CRIME, WAS THAT AT THE DEFENSE REQUEST?

A. AT THE DEFENSE REQUEST TO GO IN AND TALK TO HIM.

Q. THE TIMES THAT YOU SAW HIM PRIOR TO THE CRIME, YOU HAD [1638] INDICATED AT SOME POINT THERE YOU SAW A LEVEL OF ABUSE?

A. THAT'S CORRECT.

Q. AND, AGAIN, THAT WAS BASED ON HIS REPRESENTATIONS TO YOU; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. YOU HAD INDICATED - YOU TALKED ABOUT WORDS WITH NO AFFECT?

A. RIGHT.

Q. YOU SAID WHEN HE RELATED TO YOU, IT WOULD BE ALMOST AS IF HE HAD READ IT IN THE NEWSPAPER. I THINK THAT'S THE WAY YOU PUT IT.

A. YES, SIR.

Q. AND SO THE BASIS OF YOUR OPINION IS BASED ON WHAT YOU HAVE BEEN TOLD BY MR. SHAFER; IS THAT CORRECT?

A. NO, NOT ENTIRELY. THE BASIS OF MY OPINION WAS BASED ON WHAT I HAD BEEN TOLD BY HIM, BUT ALSO THE RESULTS OF HIS TESTING ALSO.

Q. THE TESTING THAT YOU DID?

A. THAT'S RIGHT.

Q. NOT ANY OTHER TESTING OR ANY OTHER EVALUATIONS THAT WERE DONE?

A. THAT'S CORRECT.

Q. YOU INDICATED HE HAD AN AUTHORITY CONFLICT; IS THAT CORRECT?

A. I INDICATED THAT HE ALSO INDICATED THAT HE HAD AN [1639] AUTHORITY CONFLICT.

MR. POPE: I BEG THE COURT'S INDULGENCE. (AFTER A BRIEF PAUSE.)

Q. NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ANY REDIRECT?

REDIRECT EXAMINATION BY

MR. NETTLES:

Q. THANK YOU VERY MUCH, YOUR HONOR. WHEN YOU SAY WORDS WITH NO AFFECT, ALMOST LIKE YOU READ IT IN THE NEWSPAPER, WHAT DOES THAT MEAN? WHAT DOES THAT MEAN, THAT PHRASE?

A. THAT THERE HAS BEEN AN AFFECTIVE SPLIT, AND BY THAT I MEAN THAT HE HAS CUT OFF THE EMOTIONS THAT HAVE TO DO WITH THAT.

Q. HOW DO YOU KNOW THAT HE DIDN'T JUST READ IT IN THE NEWSPAPER?

A. BY THE WAY THAT IT COMES OUT, THE WHOLE HISTORY.

Q. IS THAT SOMETHING THAT YOU ARE TRAINED TO LOOK FOR?

A. THAT'S CORRECT.

Q. WHAT TRAINING HAVE YOU RECEIVED THAT ALLOWS YOU TO INTERPRET THE WAY PEOPLE SAY THINGS, AND WHAT IT MEANS?

A. WELL, PRETTY MUCH ALL OF THE BACKGROUND AND TRAINING AND EXPERIENCE I HAVE HAD THAT I RELATED TO THE COURT. ALSO FOR 10 YEARS I HAVE GONE TO THE MASTERS AND JOHNSONS SEXUAL ABUSE SEMINAR AT HILTON HEAD; AND I'VE ALSO [1640] CONDUCTED A GROUP SEMINAR ON ABUSE - ABUSE IS ABUSE WHETHER SEXUAL OR PHYSICAL, THEY ARE ALL BASICALLY THE SAME.

Q. IS IT UNCOMMON FOR SOMEONE WHO IS BEGINNING ALCOHOL AND DRUG TREATMENT FOR THERE TO BE A DENIAL AT FIRST?

A. THE HALLMARK OF ADDICTION IS DENIAL, BASICALLY LYING TO THEMSELVES.

Q. NOW, IS THIS CONSISTENT WITH SOMEONE WHO HAS SUFFERED WITH ABUSE, SUFFERED FROM ABUSE, AND HAS AN ADDICTION PROBLEM FOR THEM TO BE NON-COMPLIANCE ON THEIR APPOINTMENTS?

A. IT IS NOT.

Q. IT IS NOT CONSISTENT?

A. IT IS WHAT YOU WOULD THINK WOULD HAPPEN. ONE OF THE THINGS IS WHEN YOU GET A LOT OF NO SHOWS THE FIRST THING YOU LOOK FOR IS SUBSTANCE ABUSE AND THIS M.M.P.I TESTING INDICATED THAT IT WAS HIGHLY PROBABLE, BUT HE NEVER CAME BACK AFTER THAT.

Q. SO, THAT WOULD BE STATE'S EXHIBIT 56, STATE'S EXHIBIT 58, STATE'S EXHIBIT 57, STATE'S EXHIBIT 59. ARE ALL OF THOSE CONSISTENT WITH SOMEONE WHO – I MEAN IS THAT SOMETHING YOU WOULD EXPECT FROM SOMEONE – LET ME BACK UP A SECOND. WOULD YOU EXPECT THOSE DOCUMENTS TO BE PRODUCED WHEN SOMEONE IS BEING SEEN FOR PHYSICAL ABUSE AND/OR SUBSTANCE ABUSE?

[1641] **MR. POPE:** YOUR HONOR, I AM GOING TO OBJECT; I THINK IT IS EXTREMELY LEADING.

THE COURT: REPHRASE THE QUESTION.

Q. THANK YOU. WHAT IS A DIAGNOSIS THAT THOSE DOCUMENTS COULD BE CONSISTENT WITH AS IT RELATES TO WESLEY?

A. IT COULD BE CONSISTENT WITH ABUSE, AND ALSO ADDICTION. IT IS NOT UNCOMMON. THE PROBATION OFFICER INDICATED, I THINK, THAT HE INDICATED THAT THERE WERE NO PROBLEMS WITH ADDICTION, BUT SINCE DISHONESTY IS THE NUMBER ONE PROBLEM WITH ADDICTION, THEN YOU WOULD THINK THAT HE MAY NOT BE HONEST.

Q. NOW, WHEN YOU SAY DISHONEST, YOU MEAN THE PERSON WILL LIE?

A. IT IS NOT ONLY THAT, BUT THE FACT THAT I'VE LIED ABOUT MYSELF FOR SO MUCH FOR SO LONG THAT I DON'T KNOW WHAT THE TRUTH IS. IT IS A VERY DEEPLY INGRAINED THING. I REALLY BELIEVE THAT HE BELIEVED WHEN HE TOOK THE TEST HE WAS GOING TO COME OUT FINE. THAT'S THE LEVEL OF ADDICTION AND DENIAL THAT WAS GOING ON WITH HIM.

Q. HOW CAN YOU RECONCILE THE DISHONESTY ABOUT THE ALCOHOL WITH BEING ABLE TO RELY ON HIS REPORTING?

A. I'M SORRY; SAY THAT AGAIN?

Q. HOW CAN YOU RECONCILE –

MR. POPE: YOUR HONOR, I'M GOING TO OBJECT TO THAT QUESTION, HOW CAN YOU RECONCILE. THAT IS IMPROPER. HE CAN [1642] ASK WHAT HE DETERMINES FROM IT.

Q. WHAT CAN YOU DETERMINE FROM THE FACT THAT WESLEY WAS, AS YOU SAID, LYING TO HIMSELF ABOUT HIS ALCOHOL PROBLEM, BUT YET YOU STILL FELT COMFORTABLE RELYING ON HIS SELF-REPORTING OF ABUSE?

A. WELL, I THINK HE WAS AT SOME LEVEL LYING. I MEAN HE WAS LYING ABOUT BOTH, I BELIEVE. I THINK HE WAS LYING ABOUT THE ALCOHOL, I THINK HE WAS LYING ABOUT THE ABUSE. WHEN I SAY THAT, I THINK HE WAS LYING ABOUT HIS PART IN IT, NOT BLAMING THE PERSON WHO DID THAT. AND FREQUENTLY IN DEALING WITH THIS, BECAUSE A PERSON BELIEVES THAT THEY COULD DIE WHEN YOU'RE A KID AND THIS HAPPENS, THAT WHEN THEY TRY TO GET BACK TO IT AS AN ADULT, IT CAN BE THE SAME WAY. SO, IT IS NOT UNCOMMON FOR PEOPLE WITHOUT ADDICTION PROBLEMS TO HAVE THAT REACTION AS SOON AS YOU TOUCH ABUSE; TO BAIL OUT AS SOON AS YOU TOUCH ABUSE.

Q. ARE YOU THEN MAKING A DIAGNOSIS THAT YOU BELIEVE WESLEY IS A LIAR?

A. AM I MAKING A DIAGNOSIS?

Q. THAT WESLEY IS A LIAR.

MR. POPE: YOUR HONOR, AGAIN, I AM GOING TO OBJECT. HE HAS ASKED HIM WHAT HIS DIAGNOSIS IS, BUT HE IS TESTIFYING.

THE COURT: REPHRASE THE QUESTION.

Q. LET ME POSE YOU A HYPOTHETICAL QUESTION.

A. OKAY.

[1643] Q. IF HYPOTHETICALLY SOMEONE WERE TO SAY WESLEY SHAFER, BECAUSE HE LIED ABOUT HIS ABUSE AND LIED ABOUT HIS ALCOHOL ADDICTION TO HIS COUNSELOR, DOES THAT MEAN HIS COUNSELOR WOULD THINK HE IS A LIAR?

A. I THINK HIS COUNSELOR COULD THINK HE IS LYING, BUT IT WOULD BE MORE COMPLICATED THAN THAT.

Q. WHY?

A. BECAUSE OF ALL OF THE THINGS THAT I HAVE JUST SAID. BECAUSE OF THE DEFENSE MECHANISM, THE SUPPRESSION, DEPRESSION, DENIAL. PART OF WHAT HAPPENED IS HE WAS PROJECTING BLAME ON ANY AUTHORITY WHETHER IT WAS PROBATION AND PAROLE OR WHETHER IT WAS ME. THAT'S PART OF WHAT HAPPENS IN AN AFFECTIVE DISORDER.

Q. THANK YOU VERY MUCH.

RECROSS EXAMINATION BY

MR. POPE:

Q. MR. GOLDSMITH, IF I UNDERSTAND YOUR TESTIMONY, THE DEFENDANT CAME TO YOU FROM HAZEL PITTMAN?

A. THAT'S CORRECT.

Q. AT HAZEL PITTMAN THERE WAS A DETERMINATION OR EITHER HE REPRESENTED THAT THERE WAS NO DRUG PROBLEM; IS THAT CORRECT?

A. YES.

Q. HE CAME TO YOU, AND AS I UNDERSTAND WHAT YOU ARE TELLING THIS COURT, YOUR DETERMINATION WAS BASED THROUGH YOUR [1644] EXPERIENCE, AND IN ANALYZING HIM, AND THE TESTS THAT YOU GAVE, THAT YOU DETERMINED THAT YOU DID IN FACT BELIEVE WHAT HE WAS RELATING TO YOU. IS THAT CORRECT?

A. THAT'S CORRECT.

Q. MR. GOLDSMITH, YOU HAVE BEEN WRONG BEFORE ABOUT WHAT SOMEONE HAS REPRESENTED TO YOU, HAVE YOU NOT?

MR. NETTLES: OBJECTION; THIS IS IMPROPER RECROSS.

THE COURT: I OVERRULE THE OBJECTION.

A. I HAVE BEEN WRONG; YES, SIR.

Q. THANK YOU.

THE COURT: YOU MAY STEP DOWN, AND BE EXCUSED.

* * *

[1681] **THE COURT:** CALL YOUR NEXT WITNESS.

MR. BANKS: THANK YOU, YOUR HONOR. ON BEHALF OF WESLEY SHAFER THE DEFENSE CALLS LIEUTENANT COLONEL DAVID GROSSMAN

THE COURT: STEP UP, AND BE SWORN.

DAVID A GROSSMAN, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. BANKS:

Q. STATE YOUR FULL NAME TO THE JURY, SIR.

A. LIEUTENANT COLONEL DAVID GROSSMAN.

Q. AND WHERE DO YOU LIVE?

A. IN JONESBORO, ARKANSAS.

[1682] **DAVID A. GROSSMAN – DIRECT BY MR. BANKS**

Q. DID YOU JUST FLY INTO CHARLOTTE A COUPLE OF MINUTES AGO?

A. YES, I DID.

Q. WHAT IS YOUR OCCUPATION?

A. I AM AN ARMY OFFICER, AND A PSYCHOLOGIST.

Q. AND WHAT IS YOUR PARTICULAR AREA OF EXPERTISE IN PSYCHOLOGY?

A. THE PSYCHOLOGICAL EFFECTS OF VIOLENCE AND WHY PEOPLE KILL.

Q. ARE YOU A DOCTOR?

A. NO, I AM NOT; I AM IN THE PROCESS OF WORKING ON MY DOCTORATE RIGHT NOW. I'VE BEEN IN THE ARMY FOR THE LAST 23 YEARS.

Q. AND YOU RECENTLY RETIRED?

A. I'M SORRY?

Q. AND YOU RECENTLY RETIRED FROM THE ARMY?

A. YES, I DID; I RETIRED FROM THE ARMY LAST FRIDAY.

Q. WHAT IS YOUR RANK?

A. LIEUTENANT COLONEL.

Q. AND WHAT IS THE NEXT RANK AFTER LIEUTENANT COLONEL - WHAT WAS THE LAST AND WHAT WAS THE NEXT ONE?

A. WELL, I STARTED AS A PRIVATE, AND SERGEANT; AND THEN IN THE OFFICER RANKS THERE'S FIRST AND SECOND LIEUTENANT, AND THEN CAPTAIN, MAJOR, AND THE TWO RANKS OF COLONEL, LIEUTENANT COLONEL AND FULL COLONEL. SO, BEFORE ME LIES FULL COLONEL AND THEN GENERAL. BUT I STEPPED OFF AT [1683] THAT.

Q. WHAT WAS YOUR LAST JOB IN THE ARMY?

A. I WAS THE PROFESSOR OF MILITARY SCIENCE, AND THE CHAIR OF THE DEPARTMENT OF MILITARY SCIENCE AT ARKANSAS STATE UNIVERSITY.

Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?

A. I STARTED WITH A ASSOCIATE DEGREE WITH MY FREE TIME AT FAYETTEVILLE STATE UNIVERSITY OUTSIDE OF FORT BRAGG; AND THEN I RECEIVED MY BACHELORS DEGREE FROM COLUMBUS COLLEGE IN COLUMBUS, GEORGIA.

Q. AND WERE YOU A MEMBER OF ANY HONOR SOCIETIES AT THOSE COLLEGES?

A. YES, I GRADUATED WITH A DEGREE IN HISTORY, PHI KAPPA PHI, SUMMA CUM LAUDE WITH A 4.0 GPA.

Q. AND YOU GRADUATED WITH HONORS?

A. YES, I DID.

Q. WHAT WAS YOUR GPA?

A. 4.0. -

Q. WHEN DID YOU GRADUATE FROM COLUMBUS COLLEGE?

A. 1984.

Q. HAD YOU JOINED THE ARMY PRIOR TO GOING TO COLLEGE?

A. YES, I DID. IN 1974 I ENLISTED; WENT TO SCHOOL - I'VE DONE ALL OF MY SCHOOLING WHILE I'VE BEEN IN THE ARMY.

Q. WHAT DID YOU DO AFTER YOUR UNDERGRADUATE DEGREE?

A. I SERVED A TOUR AS A CAPTAIN IN THE SEVENTH INFANTRY [1684] DIVISION. I HAD TWO YEARS ON THE GENERAL'S STAFF, AND A YEAR AND A HALF IN COMMAND OF AN INFANTRY COMPANY.

Q. DID YOU ULTIMATELY RECEIVE A GRADUATE DEGREE?

A. YES, I DID. I RECEIVED A MASTERS IN EDUCATIONAL PSYCHOLOGY ENROUTE TO TEACHING AT WEST POINT, SERVING AS A PROFESSOR AT WEST POINT.

Q. WHERE DID YOU RECEIVE YOUR MASTERS?

A. UNIVERSITY OF TEXAS AT AUSTIN.

Q. AND WHEN DID YOU GRADUATE?

A. 1990.

Q. WHAT WAS YOUR MAJOR COURSE OF STUDY AT THE UNIVERSITY OF TEXAS?

A. EDUCATIONAL PSYCHOLOGY WHICH FOCUSES ON HOW INDIVIDUALS LEARN.

Q. AND WERE YOU A MEMBER OF ANY HONOR SOCIETIES?

A. YES, I WAS. AGAIN, PHI KAPPA PHI.

Q. AND YOUR GPA FROM TEXAS?

A. 3.9 GPA.

Q. HAVE YOU ATTAINED ANY ACADEMIC APPOINTMENTS AFTER YOU COMPLETED YOUR-MASTERS?

A. YES, I DID. MOST RECENTLY, AGAIN, AS THE PROFESSOR OF MILITARY SCIENCE AND THE DEPARTMENT CHAIR AT THE ARKANSAS STATE UNIVERSITY.

Q. WHAT DO YOU DO THERE IN THAT JOB?

A. I WAS IN COMMAND OF AN ACADEMIC CHAIR, IN CHARGE OF A [1685] VARIETY OF DIFFERENT CLASSES, ABOUT 20 INSTRUCTORS WHO TAUGHT AROUND 600 STUDENTS A YEAR, INSTRUCTIONS IN MILITARY SCIENCE, HISTORY, SMALL ARMS, AND A WIDE VARIETY OF OTHER MILITARY AND LAW ENFORCEMENT ARMS INSTRUCTION.

Q. HAVE YOU ATTAINED ANY OTHER ACADEMIC POSITIONS?

A. YES; I WAS THE ASSISTANT PROFESSOR AT WEST POINT, THE UNITED, STATES MILITARY ACADEMY IN THE DEPARTMENT OF BEHAVIORAL SCIENCES AND LEADERSHIP.

Q. AND WHAT IS BEHAVIORAL SCIENCES AND LEADERSHIP?

A. BEHAVIORAL SCIENCES AND LEADERSHIP IS A DEPARTMENT AT WEST POINT THAT FOCUSES ALSO ON THE PROCESSES OF THE HUMAN MIND, THE INTERACTION, AND FOLLOWING AND LEADING INDIVIDUALS, UNDERSTANDING THEM AND TEACHING THEM THAT WHOLE PROCESS.

Q. HAVE YOU WRITTEN ANY BOOKS, LIEUTENANT COLONEL GROSSMAN?

A. YES, I HAVE.

Q. WHAT WAS THE FIRST ONE?

A. THE FIRST ONE WAS A MILITARY REFERENCE WORK ON THE SEVENTH DIVISION; AND THE OTHER ONE IS ENTITLED ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY.

Q. AND HAVE ANY OF THESE BOOKS BEEN NOMINATED FOR ANY AWARDS?

A. YES. ON KILLING WAS NOMINATED FOR A PULITZER PRIZE FOR [1686] NON-FICTION IN 1995.

Q. WHAT IS THE SUBJECT MATTER OF THE PULITZER NOMINATED BOOK?

A. BASICALLY, IT FOCUSES ON, AND IT IS THE FIRST TIME THAT ANYBODY HAS EVER REALLY DONE IN DEPTH RESEARCH OR IN DEPTH WRITING ON THE PROCESS BY WHICH INDIVIDUALS – THE PROCESSING OF KILLING IN COMBAT, AND WHAT HAPPENS TO INDIVIDUALS WHEN THEY KILL IN COMBAT. I HAVE INTERVIEWED OVER 200 PEOPLE ON THEIR EXPERIENCES OF KILLING, PRIMARILY VETERANS. INCREASING NUMBERS NOW, LAW ENFORCEMENT PERSONNEL, AND CRIMINALS. AND NOTE THE IRRESISTANCE TO KILLING THROUGHOUT HISTORY IN HEALTHY INDIVIDUALS, THE EXISTENCE OF THAT RESISTANCE, HOW THEY HAVE LEARNED TO TURN IT OFF IN THE MILITARY, THE PRICE, AND THE REACTIONS OF INDIVIDUALS WHO

KILL. AND ALSO IN THE LAST SECTION OF THE BOOK AS A CULMINATING SECTION, LOOKED AT HOW WE ARE INDISCRIMINATELY DOING TO OUR CHILDREN WHAT THE MILITARY DOES ON PURPOSE TO TURN THE SAFETY CATCH OFF OF HUMAN BEINGS, IF YOU WILL.

* * *

[1714] Q. WOULD A FAMILY SITUATION THAT INCLUDED ABUSE ENHANCE THE [1715] EFFECT?

A. AGAIN, IT IS THE INTERACTIVE, MULTIPLICITIVE EFFECT IN SO MANY CASES. SO, IF YOU SEE THAT I'M BEING ABUSED, AND THEN YOU SEE ALL THESE PEOPLE ON TELEVISION ARE BEING ABUSED, AND ALL THESE PEOPLE ARE BEATING EACH OTHER UP, THE NET RESULT IS THE CONCEPT OF THE WORLD AGAIN THAT THIS IS IT, THIS IS THE WAY THAT PEOPLE TREAT EACH OTHER; THIS IS THE WORLD, AND THAT'S ALL IT'S EVER GOING TO BE.

Q. DID YOU REVIEW ANY OTHER MOVIES THAT WESLEY SHAFER WATCHED OTHER THAN "FACES OF DEATH"?

A. YES, I DID. THERE WERE MOVIES SUCH AS "JUICE", AND "MENACE TO SOCIETY" – "MENACE TO SOCIETY" IN PARTICULAR IS VERY PERTINENT TO THIS CASE –

Q. WHY IS THAT?

A. TWO REASONS. NUMBER ONE, HE WATCHED IT OVER 50 TIMES. I'VE NEVER SEEN ANY MOVIE IN MY LIFE MORE THAN MAYBE FIVE TIMES. I THINK WHEN I WAS A KID I MAY HAVE WATCHED THE

WIZARD OF OZ ONCE A YEAR FOR FIVE YEARS IN A ROW. IT'S ALMOST BEYOND MY ABILITY TO COMPREHEND, EXCEPT TO KNOW THAT IT IS INCREDIBLY PROFOUND.

A. NOW, IN THE MOVIE – SO, NUMBER ONE, HE SAW IT 50 TIMES. NUMBER TWO, THERE IS A SCENE IN THE MOVIE WHICH IS ASTOUNDINGLY SIMILAR TO WHAT HAPPENED IN THIS CASE.

Q. HAVE YOU SEEN THE VIDEO TAPE IN THIS CASE?

[1716] A. YES.

Q. THE SCENE IN THE MOVIE, HOW IS IT LIKE THE VIDEO THAT YOU VIEWED IN THIS CASE?

A. ALL RIGHT. WHAT HAPPENS IS AN INDIVIDUAL WALKS INTO A STORE. NOW THIS IS A SCENE VERY SIMILAR TO THE MOVIE "JUICE" AS WELL. AN INDIVIDUAL WALKS INTO A STORE AND HAS NO INCLINATION TO KILL. IN THE MOVIE "MENACE TO SOCIETY", THEY HAVE NO INCLINATION TO DO ANYTHING. THEY GO IN THERE, AND THE INDIVIDUAL FINDS HIMSELF OFFENDED BY THE OWNER; THE INDIVIDUAL HAS A WEAPON, AND REFLEXIVELY, WITHOUT EVER THINKING ABOUT IT, AND THAT'S WHAT WE KEEP SEEING OVER AND OVER AGAIN, THE INDIVIDUAL KILLS. THE STORE OWNER DROPS DOWN, AND THEN THE MURDERER LEANS OVER THE COUNTER, PUTS THE WEAPON DOWN AND SHOOTS AGAIN IN A SCENE THAT IS REMARKABLY SIMILAR TO THAT SCENE WHICH I

SAW IN THE VIDEO TAPE OF THE ACTUAL KILLING AND THE CIRCUMSTANCES.

Q. COLONEL GROSSMAN, YOU HAD INDICATED TO THE JURY BY THE PARTICULAR WAY THAT YOU HAD DONE YOUR HAND. IS THAT FROM THE "MENACE TO SOCIETY" AND THE VIDEO TAPE?

A. YES, THAT IS A LEARNED TECHNIQUE. ALL THESE THINGS ARE LEARNED AND POWERFULLY INGRAINED FROM MULTIPLE, MULTIPLE REPETITIONS OF WATCHING THESE MOVIES.

Q. YOU HAD AT ONE POINT INDICATED MOVIES AND VIDEO TAPES, WHAT'S THE DIFFERENCE, HOW DO THEY RELATE TO THE CONCEPT [1717] OF VIOLENCE?

A. I NEED TO LAY A GROUND WORK IN ORDER FOR YOU TO UNDERSTAND. IN WORLD WAR II WHEN WE BECAME AWARE, THIS IS IRREFUTABLY, OF THE FACT THAT THE MAJORITY OF OUR SOLDIERS IN COMBAT SITUATIONS WERE NOT FIRING THEIR WEAPONS AT THE ENEMY. ONCE YOU BECOME FRIGHTENED, ONCE YOU BECOME ANGRY, ONCE THE HEART RATE GOES BEYOND A CERTAIN LEVEL, THE FOREBRAIN CLOSES DOWN AND THE MIDBRAIN, THE BRAIN THAT ALL MAMMALS HAVE IN COMMON, TAKES OVER. HARDWIRED IN THAT MIDBRAIN APPEARS TO BE A RESISTANCE TO KILLING YOUR OWN KIND. EVERY SPECIES HAS A RESISTANCE TO KILLING THEIR OWN KIND. ANIMALS WITH ANTLERS AND HORNS JUST SLAM HEAD TO HEAD WITH EACH OTHER IN THE MOST HARMLESS POSSIBLE FASHION IN THEIR TERRITORIAL MATING

BOUTS, BUT AGAINST OTHER SPECIES THEY GO TO THE SIDE TO GUT AND BORE. PIRANHAS FIGHT ONE ANOTHER WITH FLICKS OF THE TAIL, BUT THEY TURN THEIR FANGS ON EVERYTHING ELSE. RATTLESNAKES WRESTLE ONE ANOTHER, BUT THEY WILL TURN THEIR FANGS ON EVERYONE.

IF A SPECIES DIDN'T HAVE THAT RESISTANCE INDIVIDUALLY, THEN THE SPECIES WOULD DESTROY ITSELF INSIDE OF A COUPLE OF GENERATIONS. IT IS ABSOLUTELY ESSENTIAL FOR THE EXISTENCE OF THE SPECIES. AND IT IS ABSOLUTELY ESSENTIAL IN HUMAN BEINGS. WE RAN ACROSS THAT IN WORLD WAR II. WE BECAME [1718] AWARE OF THE FACT THAT OUR SOLDIERS WEREN'T FIRING. NOW, SOME WOULD AND KEY WEAPONS LIKE A B.A.R. OR A FLAME THROWER WOULD ALWAYS FIRE, AND WEAPONS LIKE MACHINE GUNS WOULD ALWAYS FIRE, BUT THE INDIVIDUAL, THE SOLDIER WAS SCARED OUT OF HIS WITS, AND THEY WOULD NOT FIRE.

SO, AT THE END OF WORLD WAR II WE SAID, HEY, THIS IS NOT GOOD. 15 PERCENT FIRING RATE IN YOUR SOLDIERS IS LIKE A 15 PERCENT LITERACY RATE IN YOUR LIBRARIANS. SO, WE WENT ABOUT THE PROCESS OF FIXING THIS. AND HOW WE FIXED IT WAS A PHENOMENON VERY MUCH LIKE THE VIDEO GAMES WE SEE TODAY, AND THE VIDEO GAMES THAT WESLEY SHAFER PLAYED.

Q. WHAT PHENOMENON IS THAT?

A. WHAT WE DID WAS THIS. WE TOOK THE SOLDIERS, AND WHERE AS IN THE WORLD WAR II

ERA WE FIRED AT THE OLD BULLS EYE TARGETS ON A KNOWN DISTANCE RATE, BY THE KOREAN WAR WE HAD INTRODUCED A REVOLUTION WHICH RAISED THE FIRING RATE TO 55 PERCENT AND BY VIET NAM WE HAD A FIRING RATE OF UP TO 95 PERCENT. AND WHAT WE DID THEN WAS THIS. WE MADE FIRING A CONDITIONED REFLEX.

WHEN PEOPLE ARE FRIGHTENED OUT OF THEIR WITS, IT IS NECESSARY TO PROVIDE THEM A HIGH RATE OF RESPONSES. WE DO IT WITH PILOTS. WE PUT A PILOT UNDER A FLIGHT SIMULATOR, A CERTAIN LIGHT GOES OFF, HE RESPONDS A CERTAIN WAY. WE HAVE HIM DO THAT HUNDREDS OF TIMES. [1719] STIMULUS RESPONSE, STIMULUS RESPONSE, STIMULUS RESPONSE, WARNING LIGHT RESPONSE, ANOTHER WARNING LIGHT RESPONSE. AFTER HUNDREDS OF REPETITIONS, IT BECOMES AN INGRAINED RESPONSE.WHEN THE AIRCRAFT IS GOING DOWN, WHEN EVERYBODY IS SCREAMING, AND HE'S SCARED OUT OF HIS WITS, THE PILOT WILL DO THE RIGHT THING REFLEXIVELY BECAUSE HE HAS BEEN CONDITIONED TO IN THE FLIGHT SIMULATOR.

Q. AND A BULLS EYE ON A RANGE DOES NOT PROVIDE THAT?

A. WE DO IT WITH CHILDREN IN A FIRE DRILL. WE TAKE CHILDREN IN A FIRE DRILL AND FROM A VERY YOUNG AGE THE ALARM BELL GOES OFF AND THEY STAND UP AND THEY TODDLE OUT. ONE DAY THERE'S A REAL FIRE; THEY ARE SCARED OUT OF THEIR WITS; THERE'S SMOKE AND THEY'RE

SCREAMING. THE BELL GOES OFF AND THEY'LL DO EXACTLY WHAT THEY HAVE BEEN CONDITIONED TO DO. WHAT WE DID IS WE CONDITIONED OUR SOLDIERS. THE BULLSEYE TARGET IS NOT WHAT'S GOING TO ATTACK YOU ON THE BATTLEFIELD. WE CHANGED THE TRAINING TO THIS. A MANNEQUIN SILHOUETTE POPS UP IN YOUR FIELD OF VIEW. CONDITIONED RESPONSE, YOU HAVE A SPLIT SECOND TO ENGAGE THE TARGET. STIMULUS FEEDBACK, YOU HIT THE TARGET AND THE TARGET DROPS. STIMULUS RESPONSE, STIMULUS RESPONSE, STIMULUS RESPONSE. HUNDREDS OF REPETITIONS OF THAT IN THE MILITARY AND IN THE LAW ENFORCEMENT COMMUNITY BECAUSE IN THE 1960'S WE DISCOVERED THAT OVER HALF OF [1720] THE LAW ENFORCEMENT OFFICERS IN SITUATIONS WHERE THEY REALLY SHOOT TO PROTECT THEIR OWN LIVES, WERE NOT FIRING. SO, THE LAW ENFORCEMENT COMMUNITY INTRODUCED A PROGRAM WHERE, AGAIN, YOU PRACTICE THE PROCESS OF FIRING AT WHAT YOU ARE GOING TO HAVE TO ENGAGE IN COMBAT.

Q. THE VIDEO GAMES, IS THAT ANALOGOUS TO THE TYPE OF TRAINING THAT LAW ENFORCEMENT AND MILITARY GET?

A. AS A MATTER OF FACT, IN A LOT OF WAYS IT IS BETTER.

Q. WHY?

A. IN THE MILITARY WE USE THOSE MEN SHAPED SILHOUETTES. IN THE VIDEO GAMES THEY

ARE REAL HUMAN BEINGS; THEY ARE VIDEO DEPICTIONS OF REAL HUMAN BEINGS.

ONE GAME THAT WESLEY SHAFER PLAYED EXTENSIVELY IS CALLED LETHAL ENFORCER. AND AS HE PLAYED LETHAL ENFORCER, HE HELD A PISTOL IN HIS HAND, A REVOLVER, VERY MUCH LIKE THE REVOLVER HE USED IN THIS CASE, AND HE POINTED AND SHOT; AND POINTED AND SHOT; AND POINTED AND SHOT LITERALLY THOUSANDS OF TIMES IN THE PLAYING OF THAT GAME.

NOW, WHAT WE DID WITH THE LAW ENFORCEMENT AND THE MILITARY COMMUNITY IS WE MADE IT A CONDITIONED RESPONSE. WE ALLOWED THE INDIVIDUALS WITH GREAT SAFEGUARDS AND GREAT PRECAUTIONS IN THE MILITARY AND LAW ENFORCEMENT WORLD. BUT THE INTERACTIVE VIDEO GAMES ARE INDISCRIMINATELY DOING TO OUR CHILDREN WHAT THE MILITARY [1721] AND LAW ENFORCEMENT WORLD DOES ON PURPOSE, BUT WITHOUT THE SAFEGUARDS.

Q. WERE THERE ANY OTHER VIDEO GAMES OTHER THAN THIS ONE THAT WESLEY SHAFER PLAYED?

A. YES, WHAT YOU HAD WAS A GAME CALLED MORTAL COMBAT WHICH, AGAIN IS A VIOLENT VIDEO GAME. AND WESLEY SHAFER'S SISTER SAID THAT THEY CAME HOME AND PLAYED ONCE A WEEK, IN PARTICULAR, THEY PLAYED MORTAL COMBAT RELIGIOUSLY. SEE, VIOLENCE, WAS THEIR RELIGION. IT WAS BRUTALLY INGRAINED BY THE FATHER; IT WAS TAUGHT BY THE MEDIA. THEIR

MOTOR SKILLS WERE TAUGHT BY THE INDIVIDUAL IN POINT AND SHOOT PROCESSING. AND THE NET EFFECT WAS THAT FROM A VERY YOUNG AGE, VIOLENCE WAS INGRAINED INTO THE INDIVIDUAL.

Q. SOCIETY OFTEN HEARS ABOUT MUSIC, GOOD MUSIC AND BAD MUSIC, DOES MUSIC HAVE ANYTHING TO DO WITH THIS CASE?

A. THE INTERESTING THING ABOUT MUSIC IS THAT WE HAVE GOT OVER 400 SCIENTIFIC STUDIES LINKING VIOLENCE IN THE MEDIA, VISUAL VIOLENCE, AND CRIME, BUT WE REALLY DON'T TO MY KNOWLEDGE HAVE ONE SINGLE SOUND STUDY LINKING MUSIC. THE PRIMARY, THE LEADING THEORY ON MUSIC IS THAT THE MUSIC IS A SYMPTOM, IT'S NOT THE ROOT CAUSE. SOMETHING HAS HAPPENED TO MAKE THESE INDIVIDUALS IDEALIZE VIOLENCE TO THE DEGREE WHERE THE VIOLENT RAP MUSIC AND THE GANGSTER RAP BECOMES ACCEPTABLE AND [1722] DESIRABLE TO THEM. THEY DON'T APPEAR TO BE A CAUSE; THEY APPEAR TO BE MORE OF AN EFFECT.

Q. YOU HAVE DISCUSSED IN YOUR BOOK THE CONCEPT OF THE REVERSE OF CLOCKWORK ORANGE.

A. YES.

Q. WHAT IS THAT?

A. IN THE MOVIE CLOCKWORK ORANGE, SOME OF YOU HAVE SEEN; WELL, WHAT HAPPENED IN CLOCKWORK ORANGE IS THAT THEY TOOK A SOCIOPATH, A MASS MURDERER, AND THEY PUT

HIM IN PRISON AND THEY STRAPPED HIM IN A CHAIR, AND HE'S WATCHING VIOLENT MOVIES WHILE HE IS TRAPPED IN THIS CHAIR. UNBEKNOWNST TO HIM, A DRUG HAS BEEN INJECTED IN HIM WHICH MAKES HIM NAUSEOUS, RIGHT? SO, HE IS SITTING THERE WATCHING VIOLENT MOVIES, AND HE IS RETCHING, AND GAGGING IN RESPONSE TO THESE VIOLENT MOVIES. AFTER HUNDREDS AND HUNDREDS OF REPETITIONS OF THIS, HE BEGINS TO ASSOCIATE VIOLENCE WITH NAUSEA. WHAT WE DO IS A REVERSE CLOCKWORK ORANGE EFFECT.

Q. AND HOW IS THAT?

A. WHAT WE DO IS WE TAKE THE CHILDREN, AND WE HAVE THEM SIT IN MOVIES, AND WE HAVE THEM, LIKE THE GUY IN CLOCKWORK ORANGE, WATCH VIVID DEPICTIONS OF HUMAN DEATH AND SUFFERING, AND LIKE PAVLOV'S DOG, WHAT DO THEY ASSOCIATE IT WITH? THEIR FAVORITE CANDY BAR, THEIR FAVORITE SOFT DRINK, THEIR ARM AROUND THEIR GIRLFRIEND, THEIR [1723] GIRLFRIEND'S PERFUME.

I ASK THEM IN MY CLASSES WHEN I TEACH PSYCH AT WEST POINT AND ARKANSAS STATE UNIVERSITY, I SAY WHAT DOES THE AUDIENCE DO WHEN THEY SEE SOMEBODY BEING DEPICTED AS BEING BRUTALLY, HORRIFICALLY MURDERED ON THE SCREEN, AND THE ANSWER IS ALWAYS THEY CHEER AND THEY LAUGH. WE HAVE LEARNED TO CHEER – NO, WE HAVE TAUGHT OUR CHILDREN TO CHEER AND LAUGH AND DERIVE PLEASURE FROM

HUMAN DEATH AND SUFFERING IN THIS REVERSE CLOCKWORK ORANGE EFFECT. AND THEN THEY PLAY THE VIDEO GAMES, AND THEY LEARN THE MOTOR SKILLS. WE HAVE TAUGHT THEM TO KILL, AND TAUGHT THEM TO LIKE IT, AND THEN WE WONDER WHAT'S HAPPENING.

Q. BASED UPON YOUR RESEARCH IN THIS CASE, AND THE THINGS THAT YOU HAVE REVIEWED, INCLUDING YOUR INTERVIEWS WITH THE SHAFERS, WAS WESLEY SHAFER TAUGHT TO LIKE VIOLENCE IN THE SAME MANNER IN WHICH YOU DESCRIBED?

A. YES.

Q. HAVE THE MOVIES AND VIDEO GAMES THAT HE PLAYED, WOULD THEY HAVE DONE THE SAME THING?

A. ABSOLUTELY.

Q. WOULD THE SUBSTANCE ABUSE THAT HE ADMITTED TO YOU AND OTHERS BEEN ANY TYPE OF SAFETY CATCH?

A. THE SUBSTANCE ABUSE WOULD HAVE MADE HIM MORE VULNERABLE TO OUTSIDE INFLUENCES.

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[1726] Q. COLONEL GROSSMAN, THE CONCEPT OF CONSTANT FEAR OF NO ESCAPE, IS THERE ANY THING ELSE IN YOUR STUDY OF PSYCHOLOGY AND VIOLENCE WHERE IT IS ENHANCED, AGAIN, BECAUSE OF THE CONCEPT OF NO ESCAPE?

A. YES. WE SEE THE SAME THING IN BRAINWASHING, FOR INSTANCE AMONG THE PRISONERS OF WAR; WE SEE THE SAME [1727] THING WHEN THE JAPANESE USE IT WITH THEIR SOLDIERS TO ENABLE THE SOLDIERS TO COMMIT ATROCITIES; WE SEE IT AMONG THE NAZIS WHEN THEY WOULD USE VIOLENT ACTS TO DESENSITIZE THEIR OWN SOLDIERS. THE MILITARY DOES SOME OF IT WHEN WE PROVIDE A ROLE MODEL, THE DRILL SERGEANT IS ESSENTIALLY A BRUTAL ROLE MODEL ALTHOUGH VERY, VERY CAREFULLY NARROWLY ORIENTED. AND, OF COURSE, THE MOTOR SKILLS IN THE MILITARY ARE TAUGHT, AGAIN, LIKE THE VIDEO GAMES.

Q. A COMBINATION OF THE MOTOR SKILLS IN THE VIDEO GAMES, THE VIOLENCE IN THE MOVIES, SOME HE WATCHED 50 TIMES, THE ABUSE AT HOME, THE NO ESCAPE CONCEPT, AND THE CONSTANT FEAR, DID THAT COMBINATION OF CIRCUMSTANCES GIVE RISE TO A CONDITIONED RESPONSE IN WESLEY SHAFER?

A. INDEED IT DID.

Q. IS A CONCEPT OF CONDITIONED RESPONSE A REGULARLY ACCEPTED SCIENTIFIC PRINCIPLE?

A. YES, INDEED IT IS, ABSOLUTELY.

Q. CAN YOU TELL THE JURY WHAT A CONDITIONED RESPONSE IS.

A. LET ME EXPLAIN WHAT A CONDITIONED RESPONSE IS. AND THERE IS A REAL SIMPLE EXAMPLE THAT I USE WHEN I TEACH IT TO MY STUDENTS.

THERE WAS AN EXPERIMENT DONE EARLY IN THIS CENTURY IN WHICH THEY WOULD PUT RATS IN A MAZE, AND WHAT WOULD HAPPEN IS THE RAT WAS TAUGHT THAT - IT WOULD BE FOOD DEPRIVED, THEY HADN'T BEEN ABLE TO EAT FOR A DAY. [1728] AND THEY PUT HIM IN A MAZE AND AT THE END OF THE MAZE THERE IS FOOD. AND THE RAT VERY QUICKLY LEARNED TO LAND, ZIP RIGHT DOWN TO THE FOOD; LAND AND ZIP RIGHT DOWN TO THE FOOD. NOW, WHAT HAPPENED IS THAT SET OF MOTOR SKILLS BECOMES CONDITIONED, AUTOMATIC, REFLEXIVE. BUT WHAT WAS REALLY STARTLING TO THEM TO DEMONSTRATE THE DEGREE TO WHICH IT BECAME REFLEXIVE, IS THAT THEY TOOK THE MAZE, AND THEY SHORTENED IT BY JUST SIX INCHES. WHAT HAPPENED WAS THE RAT LANDED AND PLOWED INTO THE END OF THE MAZE EVERY TIME. THEY CALLED IT THEIR KERPLUNK EXPERIMENT BECAUSE OF THE SOUND THE RATS MADE WHEN THEY HIT INTO THE END OF THE MAZE.

IMAGINE, IF YOU WILL,THE ASTONISHMENT, THE SURPRISE, THE SHOCK OF THIS RAT WHEN HE SMACKED INTO THE END OF THAT MAZE. AND WHEN PEOPLE HAVE BEEN CONDITIONED TO REACT IN A CERTAIN WAY, THAT'S THE SAME KIND OF ASTONISHMENT THEY COMMUNICATE WHEN THEY HAVE DONE SOMETHING PAINFUL OR HARMFUL OR CONFUSING THAT HAS BEEN CONDITIONED INTO THEM.

Q. WHAT WOULD BE THE CONDITIONED RESPONSE TO WESLEY SHAFER?

A. IN WESLEY SHAFER THE CONDITIONED RESPONSE, THE ROOT CONDITIONED RESPONSE IS WHEN HE HOLDS A WEAPON IN HIS HAND AND HE POINTS IT AT ANOTHER HUMAN BEING IS TO PULL THE TRIGGER. IN THOSE GAMES HE IS NEVER, NEVER, NEVER REINFORCED FOR DOING NOTHING. YOU NEVER PUT A QUARTER [1729] INTO THE MACHINE AND HOLD THE WEAPON UP AND DON'T FIRE IT. YOU DO IN THE MILITARY. THE PROPER ANSWER IN THE MILITARY IN THE EARLY STAGES OF TRAINING, THE TARGET POPS UP AND YOU DON'T FIRE. IT'S A RIGHT RESPONSE. YOU DO IT IN LAW ENFORCEMENT. BUT YOU NEVER PUT A QUARTER IN THAT MACHINE, HOLD THE GUN UP AND DON'T FIRE IT. A CONDITIONED RESPONSE IS TO PULL THE TRIGGER.

Q. COULD SOMEONE WITH THAT CONDITIONED RESPONSE CARRY A WEAPON FOR THE PURPOSE OF COMMITTING AN ARMED ROBBERY AND NOT END UP SHOOTING IT?

A. IT WOULD BE EXTRAORDINARILY DIFFICULT FOR THEM TO NOT SHOOT IT.

Q. NOW, HAVE YOU COME ACROSS PEOPLE IN YOUR STUDY WHO DO NOT FIT THE PROFILE; IN OTHER WORDS, ARE THERE THOSE PEOPLE WHO KILL BEYOND THE BOUNDARIES OF YOUR STUDY?

A. SURE.

Q. WHO ARE THEY, AND HOW DOES THAT OCCUR?

A. WHEN YOU RUN INTO THE INDIVIDUALS WHO LIKE COMBAT, THEY ARE RARE. WE HAVE BEEN ABLE TO IDENTIFY THE FACT THAT THEY RUN ABOUT TWO PERCENT; THEY ARE ESSENTIALLY VIOLENT SOCIOPATHS. FROM A VERY YOUNG AGE THEY LIKE COMBAT, THEY LIKE CONFLICT; THEY ARE NOT DISTRESSED BY IT, THEY TAKE PLEASURE IN IT. THE WIDE VARIETY, THE VAST MAJORITY OF PEOPLE IN COMBAT, ALTHOUGH THEY TAKE PLEASURE IN SUCCESS, THEY TAKE PLEASURE IN VICTORY, THEY DO NOT TAKE [1730] PLEASURE IN THE ENEMY SUFFERING. I HAVE INTERVIEWED SOLDIERS, THEY ARE RARE. I HAVE INTERVIEWED VETERANS, THEY ARE VERY RARE. I HAVE INTERVIEWED CRIMINALS, AND, AGAIN, IT'S MORE COMMON IN THE CRIMINAL COMMUNITY WHO DO DERIVE PLEASURE IN THE SUFFERING OF OTHERS.

Q. DID YOU IN FACT FIND WESLEY SHAFER WAS WITHIN THE PARAMETERS OF YOUR STUDY OR OUTSIDE THE PARAMETERS OF YOUR STUDY?

A. HE IS IN THE PARAMETERS OF A HEALTHY INDIVIDUAL, AN AMAZINGLY HEALTHY INDIVIDUAL WHO HAS NOT LEARNED TO DERIVE ANY PLEASURE FROM HIS FELLOW HUMAN BEING'S SUFFERING. SO, HE IS NOT BY DEFINITION A SOCIOPATH WHO IS CONDITIONED.

Q. WHEN YOU INTERVIEWED WESLEY SHAFER, DID HE GIVE ANY STATEMENTS TO YOU THAT WERE CONSISTENT WITH THE THEORIES THAT YOU HAVE TOLD THE JURY TODAY?

A. WHAT HE DID WAS HE TALKED ABOUT, AND I SEE THIS SO OFTEN WITH VETERANS, HE TALKED ABOUT HOW IT SHOULDN'T HAVE HAPPENED, SHOCK, CONFUSION, DISMAY. WHEN YOU LOOK INTO THE EYES OF THESE KIND OF PEOPLE, AND YOU HEAR THEM TELL THE WAR STORIES, YOU ARE CONSTANTLY FILTERING OUT THE B.S., YOU'RE CONSTANTLY LOOKING TO CROSS CHECK THE VETERANS WITH A WIDE VARIETY OF DIFFERENT TOOLS. BUT THE ONE THING THAT PEOPLE WOULDN'T THINK TO COMMUNICATE, [1731] THEY WOULDN'T KNOW TO COMMUNICATE IS THAT SHOCK, THAT DISMAY, AND THAT CONFUSION. THE WORDS THAT HE COMMUNICATED WERE IT SHOULDN'T HAVE HAPPENED, IT WAS A MISTAKE. AND THOSE ARE THE WORDS OR SIMILAR WORDS, SIMILAR PHRASES, SIMILAR REACTIONS I'VE HEARD ON MANY OCCASIONS.

Q. DO YOU HAVE ANY ADDITIONAL INFORMATION TO PROVIDE TO THE JURY AS TO THE PHYSICAL EFFECTS THAT A CONDITIONED RESPONSE HAS?

A. YES. IN MY TIME IN THE MILITARY THERE ARE PEOPLE WHO ARE DEAD BECAUSE OF DECISIONS I HAVE MADE, AND ORDERS I HAVE GIVEN. WHEN YOU ARE IN A LIFE AND DEATH SITUATION, NOBODY CAN MAKE THAT DECISION FOR YOU. THE ONLY THING THAT YOU WILL EVER THANK ANYBODY FOR IS INFORMATION. THE ONLY THING WHEN YOU ARE IN A LIFE AND DEATH SITUATION THAT YOU WANT AND YOU NEED IS INFORMATION. I HOPE THAT I HAVE SOME INFORMATION, HAVE

BEEN ABLE TO GIVE AND MAY BE ABLE TO GIVE SOME INFORMATION FOR THOSE WHO HAVE TO MAKE LIFE AND DEATH DECISIONS.

Q. DO YOU HAVE INFORMATION ON THE PHYSICAL EFFECTS OF –

A. YES, I DO.

Q. WOULD YOU SHOW THAT TO THE JURY?

A. IF I MAY?

THE COURT: CERTAINLY.

(THE WITNESS WALKED IN FRONT OF THE JURY TO THE VIDEO [1732] MONITOR)

A. THIS IS SOME MATERIAL THAT HAS BEEN PUBLISHED IN A VARIETY OF DIFFERENT SOURCES, THE ACADEMIC PRESS ENCYCLOPEDIA OF VIOLENCE, PEACE AND CONFLICT MOST RECENTLY, AND IT'S BEING USED TO BRIEF SECRET SERVICE, F.B.I., LAW ENFORCEMENT COMMUNITIES AROUND THE WORLD. THIS IS JUST TO RECAP WHAT I SAID BEFORE, AND BASICALLY THE CONCEPT IS THIS. WHEN YOUR HEART RATE BEGINS TO GO UP, CERTAIN THINGS BEGIN TO HAPPEN. ONCE THE HEART RATE GETS ABOVE 180 BEATS PER MINUTE, ABOVE 175 BEATS PER MINUTE, AND THE THING TO REALIZE IS HOW EXTRAORDINARILY DIFFICULT IT IS TO BE IN A CONFLICT SITUATION, TO HOLD THE GUN UP TO ANOTHER PERSON AND NOT HAVE YOUR HEART BEAT GO UP; YOU CAN JUST IMAGINE WHAT IS GOING ON IN THAT SITUATION.

I WOULD SAY THAT IT IS ALMOST HUMANLY IMPOSSIBLE FOR ANY HUMAN BEING TO BE IN A SITUATION LIKE A ROBBERY WHERE YOU'RE HOLDING A WEAPON WITHOUT HAVING THAT HEART RATE GO WELL OVER 175 BEATS A MINUTE. IN ESSENCE WHAT HAPPENS IN OVER 175 BEATS PER MINUTE IS THAT THE FOREBRAIN CLOSES DOWN.

NOW LET ME EXPLAIN WHAT THAT MEANS. THE HUMAN MIND IS REALLY TWO BRAINS LAID ON TOP OF ONE ANOTHER. THE FOREBRAIN IS THE HUMAN BRAIN, THE BRAIN THAT WE USE ALL THE TIME. BUT IF ANYBODY HAS EVER TRIED TO HAVE AN [1733] ARGUMENT OR A DISCUSSION WITH SOMEBODY WHO IS FRIGHTENED OR ANGRY, YOU KNOW THAT YOU CAN'T DO THAT, RIGHT? YOU CAN'T HAVE A DISCUSSION WITH AN ANGRY PERSON OR A FRIGHTENED PERSON BECAUSE THEY ARE NOT LOGICAL. SCIENTIFICALLY, PHYSIOLOGICALLY WHAT HAS HAPPENED IS THE FOREBRAIN HAS CLOSED DOWN AND THE MIDBRAIN HAS TAKEN OVER.

ONCE THE MIDBRAIN HAS TAKEN OVER, THEY ARE NO SMARTER THAN YOUR DOG; THEY ARE NO MORE RATIONAL THAN YOUR DOG AT THAT POINT IN TIME. NOW THROUGHOUT HUMAN HISTORY WE HAVE BEEN ABLE TO COUNT ON THE FACT THAT ANGRY AND FRIGHTENED HUMAN BEINGS WON'T KILL ONE ANOTHER. REMEMBER WHAT I TOLD YOU, EVERY SPECIES HAS A RESISTANCE AGAINST KILLING THEIR OWN KIND. BUT ONCE YOUR HEART RATE IS OVER 175 BEATS PER MINUTE, IF YOU HAVE BEEN CONDITIONED TO RESPOND TO A FIRE DRILL

BY WALKING OUT THE DOOR, THAT'S WHAT YOU WILL DO. IF YOU HAVE BEEN CONDITIONED IN A FLIGHT SIMULATOR TO RESPOND TO A WARNING LIGHT WITH A CERTAIN RESPONSE, THAT'S WHAT YOU WILL DO. IF YOU HAVE BEEN CONDITIONED THOUSANDS OF TIMES TO PULL THE TRIGGER WHEN YOU HAVE A GUN POINTED AT ANOTHER HUMAN BEING, THAT'S WHAT YOU WILL DO. THE NET EFFECT OF THIS PROCESS –

Q. COLONEL GROSSMAN?

A. YES?

[1734] Q. WOULD THE COMMISSION OF A CRIME CAUSE SOMEONE'S HEART RATE TO GO UP TO THE EXTENT THAT YOU ARE DEMONSTRATING NOW?

A. WITHOUT A DOUBT. IT WOULD BE EXTRAORDINARILY DIFFICULT FOR IT NOT TO.

MR. POPE: YOUR HONOR, I OBJECT. I DON'T THINK HE HAS BEEN QUALIFIED MEDICALLY. THERE IS NO INDICATION OF THAT, AND I OBJECT TO THAT QUESTION AND ANSWER.

THE COURT: I OVERRULE THE OBJECTION.

Q. GO AHEAD.

A. ALL RIGHT, HERE'S WHAT WE'VE GOT. THIS PHENOMENON THAT WE ARE TALKING ABOUT THAT I'VE ALREADY OUTLINED HERE, AS THE CONDITION THAT HAS OCCURRED, HAS CREATED WHAT HAS BEEN REFERRED TO AS A VIRUS OF VIOLENCE, AN EXPLOSION OF VIOLENT CRIME IN AMERICA.

WHAT I WANT TO DO IS TO SHOW YOU THE BOTTOM OF THIS CHART. THIS CHART STARTS IN 1957 AND IT GOES TO 1992. NOW, DURING THAT TIME FRAME –

Q. ON THAT CHART, IF YOU WOULD SHOW WHERE WESLEY'S AGE WOULD FALL.

A. THIS GAP RIGHT IN HERE REPRESENTS, IF YOU WILL, THE TIME FRAME OF WESLEY SHAFER'S LIFE, SAY FROM ABOUT '89 ON IS REALLY THE KEY TIME FRAME. WE ARE TALKING ABOUT SOME REALLY INFLUENTIAL PROCESSES THAT ARE GOING ON THERE. PROBABLY ABOUT '85 ON WHEN HE STARTS TURNING ABOUT THREE [1735] YEARS OLD THESE THINGS OCCUR.

NOW, AS WE LOOK AT THE MURDER RATE, THE MURDER RATE HAS DOUBLED PER CAPITA, THAT IS 300,000 NUMBER OF MURDERS HAVE OCCURRED SINCE 1957. THE FIRST THING THAT WE LEARNED BASED ON THE RESEARCH DONE BY JOHNNY JULIO AND UCLA, IS THAT YOU HAVE TO IGNORE THE MURDER RATE TO UNDERSTAND THE PROBLEM AGAINST ANY BODY OF TIME BECAUSE MEDICAL TECHNOLOGY IS SAVING EVER MORE LIVES. A WOUND THAT NINE OUT OF TEN TIMES WOULD HAVE KILLED YOU IN WORLD WAR II, LATER IN VIETNAM YOU WOULD HAVE SURVIVED THAT SAME WOUND NINE OUT OF TEN TIMES. WE ALL UNDERSTAND THE LEAPS AND BOUNDS OF MEDICAL TECHNOLOGY. WHAT WE'VE GOT TO UNDERSTAND IS IF MEDICAL TECHNOLOGY WAS HELD STABLE AT

THE 1940'S LEVEL, THE MURDER RATE IN AMERICA TODAY WOULD EASILY BE TEN TIMES WHAT IT IS.

Q. AND THAT STATEMENT IS BASED ON THE RESEARCH THAT YOU HAVE DONE IN YOUR STUDY OF VIOLENCE IN AMERICA?

A. YES.

Q. NOW WHAT THAT MEANS IS THIS. IF YOU WANT TO TAKE A LOOK AT THE CRIME IN AMERICA, YOU'VE GOT TO TAKE A LOOK AT THE RATE AT WHICH PEOPLE ARE TRYING TO KILL ONE ANOTHER. THE AGGRAVATED ASSAULT RATE HAS GONE UP FROM AROUND 60 PER 100,000 IN 1956 TO OVER 400 PER 100,000 TODAY.

Q. AGAIN, COLONEL GROSSMAN, IF YOU COULD SHOW THEM ON THAT CHART WHERE WESLEY'S RESPONSE WOULD BEGIN.

[1736] A. THIS LITTLE AREA THAT REACHES FROM HERE TO HERE REPRESENTS THE TIME FRAME OF WESLEY SHAFER'S LIFETIME.

Q. AS A PSYCHOLOGIST IN THE AREA OF YOUR EXPERTISE, TO WHAT DO YOU CONTRIBUTE THAT GROWTH DURING THAT TIME FRAME?

A. IT IS NOT ONLY MY CONCLUSION; IT IS THE CONCLUSION OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN PSYCHIATRIC ASSOCIATION, THEIR EQUIVALENT IN A DOZEN OTHER NATIONS THAT THE CAUSE OF THIS EXPLOSION OF VIOLENCE IS VIOLENCE IN THE MEDIA AND VIOLENCE IN THE INTERACTIVE VIDEO GAMES

AND THE REASON FOR THAT, AMONG OTHER THINGS, THE RESEARCH THAT I HAVE BEEN ABLE TO PROVIDE FROM INTERPOL – NOW, THIS ISN'T THE FIRST TIME THAT ANYBODY HAS PUBLISHED THIS INFORMATION THAT'S IN MY BOOK, IT'S BEEN IN OTHER PLACES SUBSEQUENTLY FROM INTERPOL. IN ESSENCE WHAT HAPPENS HERE BETWEEN '77 AND '93 IS THE INTERNATIONAL SERIOUS ASSAULT RATE AND THE INTERNATIONAL MURDER RATE HAVE INCREASED WORLDWIDE, AND EVERY MAJOR INDUSTRIALIZED NATION IN THE WORLD HAS DONE THE SAME THING; THERE HAS BEEN THIS INCREASE IN VIOLENCE IN NORWAY, SWEDEN, GREECE, HUNGARY, AUSTRALIA, FRANCE, SCOTLAND, BELGIUM, DENMARK, ENGLAND, WALES, THE U.S., INDIA, HUNGARY, AROUND THE WORLD EVERY NATION THAT EMBRACES VIOLENCE FOR THEIR CHILDREN AS ENTERTAINMENT IS PAYING THE SAME PRICE. AND THERE HAS BEEN A CONCLUSIVE COMPREHENSIVE [1737] WORLDWIDE CONCLUSION AS TO WHAT IS GOING ON, AND WHY THIS IS OCCURRING. WE'RE LEARNING TO KILL IN THE INTERACTIVE VIDEO GAMES, AND WE'RE LEARNING TO LIKE IT IN THE MOVIES.

Q. COLONEL GROSSMAN, AS YOUR STUDY INDICATES THAT PEOPLE ARE BEGINNING TO NOTICE THE EFFECT OF VIOLENCE IN THE MEDIA, IS THAT ANALOGOUS TO A PREVIOUS RECOGNITION OF THE AFFECT OF SEX IN THE MOVIES?

A. SEX IN THE MOVIES IS SOMETHING THAT WE HAVE HAD A GREAT DEAL OF DIFFICULTY PINNING DOWN. THE LINK BETWEEN SEX AND

PREGNANCY IS PROBABLY THERE, BUT, YOU KNOW, YOU CAN'T PUT TOGETHER THE KIND OF STUDIES THAT WOULD DEMONSTRATE IT AS WE HAVE WITH VIOLENCE IN THE MEDIA. LET ME GIVE YOU A –

Q. IF SOMEONE SAYS, YOU KNOW, MAMA, I WANT TO GO WATCH A MOVIE AND IT'S RATED R BUT THERE'S NO SEX IN IT, IS THAT THE TYPE OF CONCERN YOU ARE EXPRESSING HERE?

A. SURE, THAT IS THE KIND OF THING – THE AMERICAN MEDICAL ASSOCIATION HAS MADE THEIR NUMBER ONE AGENDA ITEM VIOLENCE IN AMERICA, BECAUSE THE DOCTORS ARE THE ONES WHO HAVE TO DEAL WITH IT, AND THEY HAVE MADE THEIR NUMBER ONE PLAN OF THAT AGENDA EDUCATING PARENTS ABOUT THE LINK BETWEEN VIOLENCE IN THE MEDIA AND VIOLENCE IN SOCIETY.

Q. IF YOU WOULD REFER BACK TO YOUR INTERVIEWS AND RESEARCH [1738] IN THIS CASE TODAY, WHAT DID YOU LEARN FROM THE INTERVIEWS THAT YOU HAD WITH WESLEY SHAFER AND HIS FAMILY?

A. FROM WESLEY, HIS MOTHER, HIS DAD, HIS SISTER WHAT I FOUND WAS A LIFE LONG PATTERN OF ABUSE BY THE FATHER, MENTAL AND PHYSICAL. HE WAS SET ON FIRE; HIS DOGS WERE TORTURED AND KILLED; HE WAS KICKED IN THE CHEST; RANDOMLY BEAT IN THE FACE UNTIL HE BLED FROM THE NOSE AND THE MOUTH; COLD, CALCULATED, BRUTAL AND INESCAPABLE BRUTALITY.

Q. WHAT DID YOU LEARN IN YOUR CONVERSATION WITH DR. GOLDSMITH?

A. I LEARNED THAT HE WAS FILLED WITH ANGER.

Q. DR. GOLDSMITH?

A. THANK YOU VERY MUCH. NO. THAT WESLEY SMITH WAS FILLED WITH ANGER. THE STATEMENTS THAT DR. GOLDSMITH SAID –

THE COURT: YOU MEAN WESLEY SHAFER?

A. I'M SORRY; I'M SORRY, THANK YOU VERY MUCH. THAT WESLEY SHAFER WAS FILLED WITH ANGER, AND THAT THAT ANGER WAS DRIVING AND DIRECTING MOST OF HIS ACTIONS.

Q. NOW, COLONEL GROSSMAN, YOU DID NOT RECEIVE A REPORT FROM DR. GOLDSMITH, BUT YOU DISCUSSED HIS WORK WITH HIM; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. NOW, WHAT DID YOU LEARN FROM THE STUDY OF THE PROBATION [1739] RECORDS OF WESLEY SHAFER?

A. IN HIS PROBATION PROCESS, AND AGAIN PROBATION IS A LEARNING, WE ARE TRYING TO REINFORCE BEHAVIORS, WE ARE TRYING TO REINFORCE SUCCESSFUL BEHAVIORS AND PUNISH BEHAVIORS THAT ARE UNDESIRABLE. IN HIS PROBATION RECORD WHAT HAPPENED IS THERE WERE 11 TIMES WHEN HE VIOLATED PROBATION, THEY

WEREN'T MAJOR VIOLATIONS, YET THEY WERE ALL INDICATIONS OF THE FACT THAT THIS INDIVIDUAL WAS GOING IN THE WRONG DIRECTION. BY FAILING TO PUNISH THOSE VIOLATIONS, THE SOCIETY THAT PROCESSED THE INDIVIDUAL THAT WERE ENTRUSTED TO THEM, FAILED TO COMMUNICATE THE PROPER MESSAGE. HE STARTED OFF PRETTY GOOD, THEN HE WENT DOWN HILL MORE AND MORE AND MORE. INCREASING FAILURE TO PROVIDE PUNISHMENT AND TO HOLD HIM ACCOUNTABLE FOR HIS ACTIONS, SO, ANY KIND OF LOVING, GUIDING OF REASONABLE PARAMETERS WAS LOST IN THAT OPPORTUNITY.

Q. DID THE STUDY OF THOSE REPORTS INDICATE HOW MANY TIMES HE ACTUALLY VIOLATED PROBATION?

A. I WAS ABLE TO COUNT 11 TIMES.

Q. DID ANY OF THOSE RESULT IN WARRANTS, ARRESTS OR RAMIFICATIONS?

A. NO.

Q. WHEN IS THE LAST TIME THAT PROBATION, BASED UPON THE RECORDS THAT YOU REVIEWED, COULD HAVE ACTUALLY TAKEN HIM [1740] OFF THE STREETS?

A. I BELIEVE IT WAS JUST IN THE LAST MONTH.

Q. WHAT DID YOU LEARN FROM THE DISCOVERY MATERIAL THAT WAS PROVIDED TO YOU IN THIS CASE?

A. THE INFORMATION THAT WAS AVAILABLE FOCUSED A LOT ON WHERE HE WENT, WHEN HE WENT, HOW HE WENT, BUT NEVER ON WHY. I WAS NOT ABLE TO FIND – MY GOAL IS TO GET INSIDE SOMEBODY'S HEAD, AND I WAS NEVER ABLE TO FIND ANY INDICATION OF AN INTENT OR A PLAN TO KILL AT ANY POINT IN TIME.

Q. THE IDEA OF A PLAN, IS THERE SUCH A THING AS CLINICAL MALICE?

A. YES, INDEED.

Q. WHAT IS CLINICAL MALICE?

A. THE WAY I DEFINE IT IS AN INDIVIDUAL IN COMBAT WHO GOES OUT INTENDING, AND LOOKING FORWARD TO KILLING.

Q. AND DID YOU FIND ANYTHING IN YOUR REVIEW OF THE RECORDS IN THIS CASE THAT INDICATED THAT WAS THE INTENTION OF WESLEY SHAFER?

A. NO, NO.

Q. IS IT YOUR OPINION THEN THAT WESLEY SHAFER'S SHOOTING OF THE GUN AND KILLING OF MR. BROOME WAS A RESULT OF CONDITIONED RESPONSE?

A. IT IS THE SAME THING THAT WE'VE SEEN, IT COULD BE ANY ONE OF UNTOLD THOUSANDS OF KIDS ACROSS AMERICA HOLDING [1741] THAT GUN AT THAT TIME.

Q. WHAT DID YOU LEARN FROM THE VIDEO TAPE IN THIS CASE?

A. IT LOOKED TO ME LIKE WHAT WE WERE LOOKING AT WAS A CONDITIONED RESPONSE ON THE ONE HAND, AND THE BUILT IN HARDWARE PROGRAM THAT WAS FOLLOWING THE ACTIONS OF THAT MOVIE. AGAIN, A CONDITIONED RESPONSE, YOU NEVER HOLD THAT WEAPON UP AND NOT SHOOT. WHEN YOU ARE PLAYING THOSE GAMES, THEY WILL DO SOMETHING, SOMETHING WILL HAPPEN THAT WOULD CAUSE YOU TO SHOOT. SOMETHING HAPPENED AND HE SHOT.

Q. DID YOU SEE ANYTHING ON THE VIDEO TAPE THAT WOULD INDICATE ANYTHING THAT THE DECEASED DID TO WESLEY SHAFER AT ALL?

A. NO, NO. IT'S SO HARD TO TELL, AND I LOOKED VERY HARD.

Q. IN YOUR REVIEW OF THE DISCOVERY OF THE CASE DID YOU FIND WHERE WESLEY SHAFER HAD MADE ANY STATEMENT THAT SAID WHAT HIS VIEW WAS OF WHAT OCCURRED?

A. YES.

Q. WHAT WAS THAT?

A. IT APPEARED THAT – AGAIN, WHEN YOU FOCUS ON THE HEART OF A PERSON WHEN A PERSON KILLS ANOTHER PERSON, THE HEART RATE IS THROUGH THE ROOF AND MEMORY BECOMES VERY BAD; TIME TENDS TO COMPRESS.

Q. SOMETHING THAT IS SEVERAL SECONDS TO SOMEBODY ELSE MAY BE INSTANTANEOUS TO SOMEBODY ELSE; IS THAT WHAT YOU [1742] MEAN?

A. YES.

Q. AND HOW DOES THAT RELATE TO THIS CASE ON THE VIDEO TAPE?

A. IN THIS CASE HE RELATES IT AS HAVING BEEN, THE SECOND SHOT AUTOMATIC. AND THE REALITY OF WHAT HE DID, AND WE SEE THIS IN LAW ENFORCEMENT OFFICERS A LOT, WHERE THEY SHOOT UNTIL THE TARGET STOPS MOVING. IN THIS CASE HE APPEARED TO HAVE MOVED, AND FIRED A SECOND SHOT. IT'S PART OF WHAT THE PROGRAM WAS IN THE MOVIE TO ONE DEGREE. TO ANOTHER DEGREE IT IS VERY CONSISTENT WITH INDIVIDUALS IN THAT CIRCUMSTANCE. HE HAS NO REAL CAUSE TO LIE ABOUT THAT. IT APPEARS THAT IT HAD COMPRESSED IT IN HIS MIND.

Q. WHEN DID HE SAY HE FIRED THE SECOND –

A. HE SAID IT HAPPENED IMMEDIATELY, AS HE WAS FAILING ALMOST –

Q. WHEN MR. BROOME WAS –

THE COURT: LET ONE FINISH BEFORE THE OTHER STARTS. THE COURT REPORTER, I KNOW, IS HAVING TROUBLE TAKING IT DOWN.

Q. THANK YOU, YOUR HONOR. WHAT DID YOU REVIEW IN REGARD AS TO THE STATEMENT OF WESLEY SHAFER AS TO WHEN HE BELIEVED THE SECOND SHOT WAS FIRED?

A. HE BELIEVED APPARENTLY THE SECOND SHOT WAS HAPPENING AS MR. BROOME WAS FALLING.

Q. AND THE VIDEO TAPE DOES NOT SHOW THAT, OBVIOUSLY?

A. THAT'S CORRECT.

[1743] Q. WHAT DID YOU LEARN FROM ANY REVIEW OF ANY CRIMINAL RECORD OF WESLEY SHAFER?

A. ONE LITTLE SIDE ASIDE IS HIS RAP SHEET, ABOUT THE FACT THAT ONE OF HIS EARLIEST INTIMACIES WAS ESSENTIALLY WITH A CHILD WHICH WAS ALL CONSENSUAL, DEFINITELY FROM THE REPORT OF THE INDIVIDUALS INVOLVED, THE GIRLS INVOLVED. HIS EARLIEST INTIMACY BECAME A CAUSE FOR SHAME. MY EARLIEST INTIMACY WAS MY WIFE, A GIRL WHO WAS TO BECOME MY WIFE WHO WAS OF AN AGE THAT THE STATE OF NEBRASKA COULD HAVE PUT ME IN JAIL. I THINK ABOUT THAT SOMETIMES.

MR. POPE: YOUR HONOR, I OBJECT.

THE COURT: I SUSTAIN THE OBJECTION. LET'S DON'T GO INTO PERSONAL MATTERS.

A. I'M SORRY.

Q. DID YOU REVIEW ANY OF THE STATEMENTS FROM THE WITNESSES AT THE HOT SPOT THAT NIGHT?

A. THE WITNESSES DURING THE PERIOD PRIOR, YES.

Q. AND WHAT DID YOU LEARN FROM THEIR STATEMENTS?

A. IT WOULD APPEAR THAT, NUMBER ONE, THERE WERE A COUPLE OF YOUNG BOYS THAT WANTED ATTENTION. THEY WERE FIRING SHOTS. THEY ASKED TWO GIRLS TO COME WITH THEM WHICH IS VERY INTERESTING. NOW, YOU DON'T ASK SOMEONE TO COME WITH YOU TO A ROBBERY, TO A MURDER. THE SPONTANEITY OF THE WHOLE THING COMES THROUGH. THEY ARE LOOKING FOR [1744] ATTENTION.

THE INTERESTING THING IS THAT WHEN THEY FIRED THE SHOTS THAT MEMBERS OF THE COMMUNITY DIDN'T REPORT IT WHICH IS ANOTHER INSIGHT INTO THE WAY OF WHICH WE'VE GOT A WHOLE GENERATION WHO HAVE BECOME JADED.

Q. DID IT SURPRISE YOU AT ALL OF THE REPORTS OF THE ATTENTION GETTING REACTIONS?

A. NO, THEY LEFT.

Q. DID IT SURPRISE YOU AT ALL THAT THEY DID NOT CALL LAW ENFORCEMENT?

A. NO.

Q. WHY NOT?

A. AGAIN, THAT'S WHAT THE CHILDREN HAVE LEARNED. THAT'S WHAT WE'VE TAUGHT THEM; WE HAVE TAUGHT THEM TO LAUGH AT THESE THINGS. AND THE IDEA OF CALLING THE POLICE IS ALMOST ALIEN FROM THEIR MINDS, AT LEAST TO A DEGREE.

Q. YOU TOLD THE JURY ABOUT THE MOVIES AND THE RESULTING CONDITIONED RESPONSE. IF SOMEONE WERE TO WATCH VIOLENT MOVIES WITH

A LOVING FATHER WHO IS THEIR BEST FRIEND, WHAT IS THE DIFFERENCE BETWEEN THAT AND THE TYPE OF ENVIRONMENT THAT WESLEY SHAFER WATCHED THE MOVIES IN?

A. IT IS ALL THE DIFFERENCE IN THE WORLD BETWEEN WATCHING A MOVIE ONCE OR TWICE WITH SOMEBODY WHO IS PROVIDING A STRUCTURE, AND WATCHING IT 50 TIMES ON YOUR OWN. THE DIFFERENCE IS PROFOUND.

[1745] Q. HAVE YOU FORMED AN OPINION TO A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AND IN YOUR AREA OF EXPERTISE ON THIS CASE?

A. INDEED.

Q. AND WHAT IS THAT?

A. I BELIEVE THAT WHAT WE ARE LOOKING AT, AND WHAT WE ARE SEEING OVER AND OVER AGAIN IS THIS IS A TYPICAL SPECIFIC CASE THAT STICKS OUT BECAUSE IT IS SO COMMON. WE ARE SEEING A CONDITIONED RESPONSE CONDITIONED BY VIOLENCE, INESCAPABLE ALL CONSUMING VIOLENCE AT HOME, IN THE MOVIES, IN THE VIDEO GAMES AND IN THE COMMUNITY AS IS SHOWN BY THE CRUELTY INFLICTED ON HIS PETS, NOT TEMPERED BY ANY STRUCTURE OR BY ANY INSTITUTION OR BY HIS FAMILY. AND AS A RESULT, HE HAD NO IDEA OF WHY HE SHOT, AND REALLY AND TRULY I BELIEVE HE HAD NO PLAN TO SHOOT.

Q. THANK YOU, COLONEL GROSSMAN.

. . .

[1815] **MR. BRACKETT**: YES, SIR. THE NEXT ISSUE I WOULD RAISE, YOUR HONOR, IS I DO NOT BELIEVE THAT THE DEFENDANT IS ENTITLED TO A STATUTORY MITIGATING CHARGE OF NO SIGNIFICANT HISTORY OF A VIOLENT CRIME. YOUR HONOR, THIS DEFENDANT STANDS CONVICTED OF CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE WITH A MINOR WHICH IS LISTED IN THE CODE AS A VIOLENT CRIME. IN ADDITION, IT IS ALSO LISTED AS A CRIME OF VIOLENCE. BURGLARY, HE WAS ALSO CONVICTED OF THAT WHICH IS LISTED AS A CRIME OF VIOLENCE.

I UNDERSTAND THAT YOUR HONOR IS CONCERNED WITH THE MEANING AND THE SHADING OF THE WORD SIGNIFICANT, AND I UNDERSTAND THAT IS A RELATIVE TERM. YOUR HONOR, I WOULD SUBMIT THAT IF THIS DEFENDANT WAS 50 YEARS OLD AND THIS WAS ALL THAT WAS ON HIS RECORD, IT MIGHT NOT BE SIGNIFICANT, BUT THE FACT OF THE MATTER IS THAT THIS DEFENDANT HAS ONLY BEEN ELIGIBLE TO RACK UP AN ADULT CRIMINAL RECORD FOR THE LAST TWO YEARS. HE HAS BEEN IN JAIL FOR NINE MONTHS OF THOSE TWO YEARS. SO, ESSENTIALLY, IN A LITTLE OVER A YEAR THIS DEFENDANT HAS GOTTEN A CONVICTION FOR TWO OF THE MOST SERIOUS [1816] CRIMES THAT WE HAVE. AS A MATTER OF FACT, I BELIEVE CSC SECOND WITH A MINOR IS A MOST SERIOUS OFFENSE.

THE COURT: WELL, WHAT HAPPENS TO DUE PROCESS IF YOU ARGUE THAT A 50 YEAR OLD MAN WOULD BE ENTITLED TO IT, BUT A 19 YEAR OLD WOULD NOT?

MR. BRACKETT: WELL, SIGNIFICANT IS A RELATIVE TERM. AS I SAID, YOUR HONOR, WHAT IS SIGNIFICANT IN A SPAN OF 25 YEARS OF BEING AN ADULT IS DIFFERENT FROM WHAT IS SIGNIFICANT IN BEING AN ADULT FOR TWO YEARS.

THE COURT: WHAT IF HE WERE 20?

MR. BRACKETT: I WOULD SAY THAT HE IS - I SUBMIT THAT -

THE COURT: ANSWER MY QUESTION. WHAT IF HE WERE 20?

MR. BRACKETT: HE WOULD NOT BE ENTITLED TO IT. I DON'T BELIEVE HE WOULD BE ENTITLED TO IT IF HE IS 50.

THE COURT: I AM GOING TO CHARGE MITIGATING CIRCUMSTANCE NUMBER 1. ALL RIGHT, WHAT ELSE?

. . .

[1817] **MR. BRACKETT:** YOUR HONOR, FINALLY - WELL, THE LAST TWO ISSUES. THE FIRST ONE I WOULD ARGUE THAT WE HAVE NOT MADE FUTURE DANGEROUSNESS AN ISSUE IN THIS CASE UNDER STATE VERSUS SUTHERLAND. I HAVE A COPY OF THAT CASE HERE, AND STATE VERSUS TUCKER. STATE VERSUS SUTHERLAND, 447 SOUTHEASTERN REPORTER 2D 862; AND STATE VERSUS

TUCKER, 462 SOUTHEASTERN 2D 263. BOTH OF THESE CASES HOLD THAT UNLESS THE STATE ARGUES FUTURE DANGEROUSNESS, THAT THE DEFENDANT IS NOT ENTITLED TO A CHARGE ON PAROLE INELIGIBILITY, CITING [1818] SOUTH CAROLINA VERSUS SIMMONS, A SUPREME COURT CASE, WHICH HELD THE DEFENDANT IS ENTITLED WHEN THE STATE RAISES THE ISSUE OF FUTURE DANGEROUSNESS, WE CANNOT CONCEAL THE LAW FROM THE JURY THAT HE WOULD NOT BE ELIGIBLE FOR PAROLE. HOWEVER, THE STATE HAS NOT ARGUED AT ANY POINT IN TIME THAT HE WOULD BE A DANGER TO ANYBODY IN THE FUTURE, NOR WILL WE ARGUE IN OUR CLOSING ARGUMENT THAT HE WILL BE A DANGER TO ANYBODY IN THE FUTURE. AND HE IS NOT ENTITLED TO A CHARGE THAT HE IS NOT ELIGIBLE FOR PAROLE. WE WOULD ASK THAT THE JUDGE NOT CHARGE THAT; AND WE WOULD MAKE A MOTION IN LIMINE TO PREVENT THE DEFENSE FROM ARGUING IN THEIR CLOSING ARGUMENT ANYTHING TO THE EFFECT THAT HE WILL NEVER GET OUT OF PRISON OR ANYTHING OF THIS ORDER.

I HAVE THÓSE CASES IF YOUR HONOR WOULD LIKE TO SEE THEM.

THE COURT: ALL RIGHT. WHAT SAYS THE DEFENSE?

MR. BANKS: YOUR HONOR, IT'S INCREDIBLE TO ME THAT THE STATE CONTINUES TO WISH TO HAVE ITS CAKE, AND EAT IT, TOO. THE ISSUE OF ARGUING FUTURE DANGEROUSNESS IS NOT THE ARGUMENT BECAUSE ARGUMENT OF COUNSEL IS

NOT EVIDENCE. THE STATE CANNOT INTRODUCE EVIDENCE OF FUTURE DANGEROUSNESS, AND THEN SAY WE ARE NOT GOING TO ARGUE IT AND, THEREFORE, WE'RE NOT GOING TO GET A CHARGE ON THE LAW.

WE ARE EITHER GOING TO TELL THE JURY WHAT THE LAW IS OR WE'RE NOT. TORRENCE, TUCKER, SIMMONS AND ALL ARE PRE-[1819] CHANGES IN THE STATUTE. THIS STATUTE NOW ALLOWS LIFE WITHOUT PAROLE AS A CHARGE IF THERE IS EVIDENCE OF FUTURE DANGEROUSNESS.

THEY HAVE INTRODUCED POST ARREST ASSAULT, POST ARREST VIOLATIONS OF THE RULES OF THE JAIL; THERE IS NO REASON TO PUT THOSE FACTS IN EXCEPT FOR POST ARREST ACTIONS, NO REASON AT ALL, AND THAT EVIDENCE CARRIES OVER TO THE PENALTY PHASE AND IS PART OF THE PENALTY PHASE.

IF YOU PUT A JAILER ON TO SAY THAT HE IS CHARGED WITH ASSAULT AND BATTERY ON ME, THAT IS FUTURE DANGEROUSNESS.

MR. BRACKETT: YOUR HONOR, HE WAS CHARGED WITH SIMPLE ASSAULT, NOT ASSAULT AND BATTERY. AND, SECOND, WE PUT THAT IN FOR TWO REASONS, TO SHOW HIS CHARACTER AND TO SHOW HIS ADAPTABILITY TO PRISON, NOT FUTURE DANGEROUSNESS. NOBODY HAS ARGUED FUTURE DANGEROUSNESS OR SAID THAT HE MIGHT DO THIS AGAIN IN THE FUTURE, AND THE STATE DOESN'T INTEND TO IN ITS CLOSING ARGUMENT.

MR. BANKS: I DON'T SEE ANYWHERE IN THE STATUTE THAT IT SAYS ANYTHING ABOUT FUTURE DANGEROUSNESS. THOSE ARE CASE LAWS THAT PRE-DATES THE CHANGE IN THE STATUTE. THEY CANNOT ARGUE THAT THE CASE LAW SAYS YOU HAVE TO IMPUTE A DANGEROUSNESS TO GET IT WHEN THE STATUTE IS SILENT ON THAT ISSUE.

SO, OUR FIRST POSITION IS THAT THE STATUTE DOESN'T ADDRESS IT, AND THE STATUTE MUST BE CHARGED BECAUSE THE JURY [1820] MUST KNOW WHAT THE LAW IS.

OUR SECOND POSITION IS THAT THEY CANNOT USE THIS EVIDENCE FOR ONE PURPOSE, AND THEN TURN AROUND AND SAY THAT IT IS NOT FOR ANOTHER ONE. THE JURY IS THE ONLY ONE THAT CAN DETERMINE THE EVIDENCE AND HOW IT EFFECTS THEIR DECISION MAKING. WHEN THEY PUT SOMEBODY UP FOR POST ARREST ON ASSAULT, AND WE DON'T HAVE DEGREES OF FUTURE DANGEROUSNESS, YOU'RE EITHER DANGEROUS OR NOT. SIMPLE ASSAULT, ASSAULT, WHATEVER; THERE IS NO CASE LAW THAT DISTINGUISHES BETWEEN THOSE. WHEN THEY PUT THAT IN, THEY PUT IN FUTURE DANGEROUSNESS.

MR. BRACKETT: YOUR HONOR, TWO MORE POINTS ON THAT BRIEFLY. THE STATUTE USED TO SAY 20 YEARS ELIGIBILITY AND 30 YEARS ELIGIBILITY FOR PAROLE AND THE JURY WASN'T ALLOWED TO HEAR THAT.

THE SECOND POINT, YOUR HONOR, AND I'M QUOTING DIRECTLY FROM STATE VERSUS SUTHERLAND, "HERE THE SOLICITOR SPECIFICALLY AGREED NOT TO ARGUE SUTHERLAND'S FUTURE DANGEROUSNESS; THEREFORE, SUTHERLAND'S FUTURE DANGEROUSNESS WAS NOT AT ISSUE".

I SUBMIT THAT THE RULING OF THE COURT IS CLEAR IN THIS CASE. WE ARE NOT GOING TO ARGUE IT; THEREFORE, IT IS NOT IN ISSUE.

THE COURT: I FIND THAT THE MATTER OF PAROLE INELIGIBILITY WILL NOT BE CHARGED. I FIND THAT FUTURE [1821] DANGEROUSNESS, IF IT'S NOT ARGUED, IF IT'S ARGUED, IT MAY BECOME DIFFERENT.

MR. BRACKETT: YES, SIR. AND IF WE SPECIFICALLY ARGUE IT AT SOME POINT IN THE FUTURE –

THE COURT: I FIND THAT THAT IS NOT AN ISSUE AT THIS POINT.

MR. BANKS: I OBJECT TO THAT UNDER THE STATE AND FEDERAL CONSTITUTION, PARTICULARLY DUE PROCESS UNDER THE FOURTH AMENDMENT.

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[1838] **MR. BANKS:** OUR SECOND REQUEST, YOUR HONOR, IS THIS IS A MOTION IN LIMINE IN THAT CLOSING ARGUMENTS ARE – COUNSEL IS ALLOWED TO ARGUE THE FACTS AND ARGUE HOW THOSE FACTS FIT IN THE LAW, AND IT'S PRETTY MUCH PRECEDENT IN THIS STATE THAT COUNSEL

SAYS THE JUDGE WILL TELL YOU THE LAW, AND TO TAKE THE LAW AS THE JUDGE CHARGES IT AND SO FORTH. UNDER 16-320 WHICH THE COURT PLANS TO PARAPHRASE, WE MAKE A MOTION IN LIMINE THAT COUNSEL IN CLOSING CAN READ 16-320, AND I DON'T SEE ANYTHING IN OUR LAW THAT KEEPS US FROM DOING IT.

THE COURT: I'LL BE GLAD TO HEAR FROM THE STATE ON THAT.

MR. POPE: YOUR HONOR, I THINK PREVIOUS CASE LAW IS CLEAR. I MEAN THERE ARE MANY THINGS IN THE STATUTE THAT ARE ULTIMATELY NOT CHARGED TO THE JURY, AND USING THE EXAMPLE THAT MR. BRACKETT USED, IN THE PAST YOU WERE NEVER ALLOWED TO SAY 20 YEARS AS AN AGGRAVATING CIRCUMSTANCE OR 30 YEARS, THAT [1839] WOULD BE IMPROPER. AND THAT WOULD BE NO DIFFERENT THAN WHAT THE DEFENSE IS PURPORTING TO DO TODAY, YOUR HONOR.

THE COURT: I DENY THE MOTION.

MR. BANKS: MR. ALL WILL PROFFER THE READING OF THAT.

MR. POPE: YOUR HONOR, I HAVE NO OBJECTION. I THINK THE STATUTE IS WHAT IT IS; I WILL BE GLAD FOR THEM JUST TO TENDER A COPY OF THE STATUTE.

MR. BANKS: WE'LL BE GLAD TO THROUGH THE PROFFER.

[1840] THE LAST THING THAT I RECALL FROM OUR EARLIER CONFERENCE, AND I NEED TO HEAR SOMEONE TALK ABOUT THIS. SECTION 16-320(A) SAYS THE PURPOSE OF THIS SECTION THAT'S, (A), LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER. THAT (A) IS REFERENCED ELSEWHERE, WHERE STATUTORY AGGRAVATING CIRCUMSTANCES FOUND THAT THE SENTENCE OF DEATH IS NOT WARRANTED, THE TRIAL JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IN PRISON AS PROVIDED IN SUB-SECTION (A), THAT IS SUBSECTION (C). AND I HAVEN'T HEARD IT OUT HERE, BUT I JUST WANTED TO MAKE SURE BECAUSE IT WAS CALLED TO MY ATTENTION THAT THE DEFENSE WAS ASKING THAT I CHARGE THAT SENTENCE FOR THE PURPOSE OF LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE DEFENDANT. ARE YOU WITHDRAWING THAT?

MR. BANKS: WHEN WE DISCUSSED READING THE STATUTE, IT IS OUR POSITION THAT YOU CANNOT PICK AND CHOOSE ISSUES FROM THE STATUTE.

THE COURT: I'M NOT ASKING FOR ARGUMENT NOW. I JUST REMEMBERED THAT WE HAD TALKED ABOUT THIS, BUT I HAVEN'T HEARD ANY MORE ABOUT IT, SO I WANTED TO MAKE SURE THAT WE AREN'T LEAVING SOMETHING OUT. IS IT YOUR POSITION THAT I [1841] SHOULD CHARGE LIFE IN PRISON MEANS UNTIL DEATH OF THE DEFENDANT. NOT THE WHOLE STATUTE, I WANT TO HEAR ABOUT THIS ONE PHRASE.

MR. BANKS: YES, SIR, IT IS.

THE COURT: WHAT'S THE STATE'S POSITION ON THAT?

MR. POPE: YOUR HONOR, AGAIN, I THINK IT GOES BACK TO NORRIS AND THE PLAIN AND ORDINARY MEANING INSTRUCTION THAT HAS PREVIOUSLY BEEN GIVEN.

THE COURT: I HAVE OBSERVED, AND I THINK YOU HAVE, TOO, AND I THINK EVERYBODY THAT DEALS IN THESE CASES, THE LAW IN OUR SUPREME COURT, THE UNITED STATES SUPREME COURT, AND OUR LEGISLATURE IN THESE CASES CHANGES LIKE THE WIND CHANGES DIRECTION, AND YOU'VE GOT TO FOLLOW THE HISTORY, YOU'VE GOT TO SEE WHAT THE LATEST PRONOUNCEMENT IS, AND YOU'VE GOT TO WRESTLE WITH THAT. AND THAT'S WHERE WE ARE. THAT'S WHY I AM BEING SO PARTICULAR. I'M NOT TRYING TO BE SMART. I AM VERY PARTICULAR ABOUT DATES WHEN WE GET INTO THESE ISSUES.

MR. POPE: I CALL THE COURT'S ATTENTION TO THE CHANGE, AND I'M SURE THE COURT IS AWARE, I WOULD SUBMIT THAT THAT PARTICULAR LANGUAGE SUPPLANTED THE LANGUAGE THAT USED TO INDICATE -

THE COURT: I THINK THE KEY IS TO LOOK AT THE LEGISLATIVE HISTORY AND SEE WHEN THAT WAS ADDED.

MR. POPE: I'LL TELL YOU WHAT I WAS GOING TO SAY INITIALLY WAS THAT PARALLELED

YOU KNOW, WHEN IT USED TO SAY [1842] 20 YEARS AND 30 YEARS, AND NOW IT'S DESCRIBING THAT, BUT I DO NOTE THAT IN THE PREVIOUS STATUTE TO THAT, THAT EXACT SAME LANGUAGE WAS IN THERE.

THE COURT: YOU SAY PREVIOUS, I'M LOOKING AT 1996 BECAUSE THAT'S WHAT I BELIEVE APPLIES HERE.

MR. POPE: IF THAT LANGUAGE IS IN THERE. WHAT I'M SAYING IS THE LANGUAGE WAS IN THERE EVEN WHEN LIFE USED TO MEAN 20 YEARS OR IT USED TO MEAN 30 YEARS. I'M SAYING APPARENTLY IT HAS ALWAYS BEEN IN THERE, THAT SAME LANGUAGE. AND GIVEN THAT SAME LANGUAGE, THE LANGUAGE THAT THE DEFENSE REQUESTED, I DON'T SEE IT NOW, YOUR HONOR.

THE COURT: IT'S ABOUT THE SEVENTH LINE DOWN FROM THE VERY FIRST OF (A).

MR. POPE: I'VE GOT IT. FOR THE PURPOSE OF THIS SECTION LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER. I THINK THAT'S ALWAYS BEEN IN THERE, YOUR HONOR.

THE COURT: ALL RIGHT, WHERE IS IT.

MR. POPE: I'M LOOKING IN THE BOUND VOLUME OF TITLE 16. THIS IS VOLUME 8, THE ONE I HAVE IS A COPYRIGHT 1985, SO I'M LOOKING AT 1985 LAW.

THE COURT: ON 16-320(A)?

MR. POPE: YES, SIR. I WAS ALSO LOOKING AT THE '97 VOLUME. ALL I'M SAYING IS, IT'S CLEARLY IN THERE.

THE COURT: I KNOW IT'S IN THERE NOW. I'M TRYING TO FIND OUT IF IT WAS IN THERE WHEN THESE CASES CAME DOWN. I [1843] THOUGHT YOU SAID IT WAS.

MR. POPE: THAT WAS MY UNDERSTANDING. I WAS REFERRING TO '96 AND '97.

THE COURT: WE'VE GOT TO FIND OUT WHAT THE LEGISLATURE SAID LIFE IMPRISONMENT MEANT WHEN NORRIS WAS ADDRESSED, IF NORRIS IS WHAT YOU ARE RELYING ON.

MR. POPE: YOUR HONOR, IN MY REVIEW IN LOOKING AT NORRIS, I THINK THE PLAIN AND ORDINARY MEANING – AT THIS POINT THE LEGISLATURE HAS ADDRESSED FURTHER THE PLAIN AND ORDINARY MEANING AND CLEARLY DELINEATED IT, AND I SUBMIT THAT THAT WOULD BE PROPER.

THE COURT: TO INCLUDE THAT LANGUAGE?

MR. POPE: YES, UNTIL DEATH. I THINK THAT'S APPROPRIATE.

THE COURT: OKAY, ANYTHING ELSE?

MR. BANKS: NOTHING ELSE, YOUR HONOR.

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[1874] **ARGUMENT TO THE JURY BY MR. POPE**:

LADIES AND GENTLEMEN OF THE JURY, IT HAS BEEN A LONG TWO WEEKS. I KNOW IT SEEMS LIKE MONTHS AGO WHEN YOU WERE FIRST BROUGHT HERE TO REPORT AS A JURY AND ALL OF YOU WERE SELECTED AND GONE THROUGH THE QUESTIONS. YOU WILL RECALL WE TALKED ABOUT THE FIRST STAGE, AND WE'RE PASSED THAT NOW. YOU, BY YOUR VERDICT, HAVE [1875] DETERMINED THAT THE EVIDENCE IS ABUNDANTLY CLEAR, THAT THIS DEFENDANT HAS BEEN FOUND GUILTY OF MURDER; HE HAS BEEN FOUND GUILTY OF CRIMINAL CONSPIRACY; FOUND GUILTY OF ARMED ROBBERY.

SO, WE ARE NOW IN THE SECOND STAGE IN WHICH YOU THE JURY AS THE CONSCIENCE OF THIS COMMUNITY WILL DETERMINE WHAT THE APPROPRIATE PENALTY WILL BE.

WE TOLD YOU BACK WHEN WE TALKED TO YOU THAT WE WERE GOING TO BRING EVIDENCE IN AGGRAVATION, THAT YOU WERE GOING TO HEAR EVIDENCE IN MITIGATION, AND THAT YOU AS JURORS TOLD US THAT YOU COULD TAKE THAT, YOU WOULD CONSIDER ALL OF THAT AND RENDER A JUST VERDICT. AND THAT'S THE POINT WE'RE AT RIGHT NOW.

WHAT I WANT TO DO RIGHT NOW IS TO TELL YOU A LITTLE BIT ABOUT WHAT YOU CAN EXPECT AS FAR AS FROM THE JUDGE, AND WHAT YOUR JOB WILL BE. YOU HAVE GONE THROUGH A POINT SOMEWHAT WHEN YOU WENT BACK TO THE JURY ROOM AND MADE YOUR DETERMINATION IN THE

FIRST PHASE BASED ON YOUR DELIBERATIONS, BUT THIS WILL BE A LITTLE BIT UNIQUE AND I WANT TO TELL YOU A LITTLE BIT ABOUT THAT. AND THEN I'LL TELL YOU, TOO, THAT YOU WILL HAVE ALL OF THE EVIDENCE IN THE JURY ROOM. SO, I'M NOT GOING TO STAND UP HERE AND BATTER YOU WITH THE CASE OVER AGAIN. Y'ALL HAVE SEEN THE AGONY; YOU'VE HEARD THE JURY ARGUMENTS, AND I'M NOT GOING TO DO THAT TO YOU AGAIN.

THE FIRST THING I WANT TO TELL YOU IS THE JUDGE IS GOING TO GIVE YOU THE INFORMATION TO TAKE BACK TO THE JURY [1876] ROOM THAT WILL GUIDE YOU IN HOW YOU MAKE YOUR VERDICT OR HOW YOU MAKE YOUR DECISION, AND THE FIRST STEP THAT WILL HAVE TO BE MADE IS A DETERMINATION OF WHETHER OR NOT THERE ARE AGGRAVATING CIRCUMSTANCES. THE FOREMAN WILL RECEIVE THE PAPERWORK THAT WILL INCLUDE THE INSTRUCTIONS, AND ONE OF THE FIRST DETERMINATIONS YOU MAKE BEFORE YOU CAN EVEN CONSIDER WHETHER THE DEATH PENALTY SHOULD BE GIVEN IS THAT YOU HAVE TO MAKE A DETERMINATION OR A FINDING BY ALL 12 OF YOU AS TO WHETHER THERE ARE AGGRAVATING CIRCUMSTANCES.

THE JUDGE WILL SUBMIT TO YOU ONE AGGRAVATING CIRCUMSTANCE IN THIS CASE, AND THAT'S ALL YOU NEED. YOU JUST HAVE TO FIND ONE. THE JUDGE WILL SUBMIT TO YOU THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ARMED ROBBERY.

IF YOU WILL RECALL FROM HIS INSTRUCTIONS PREVIOUSLY, AGAIN HE WILL INSTRUCT YOU THAT THE ATTEMPTED ARMED ROBBERY, THAT OUR CASE IS SUFFICIENT FOR A MURDER WHILE IN THE COMMISSION OF AN ARMED ROBBERY - IN OTHER WORDS, THE FACT THAT THEY COULD NOT GET THE CASH REGISTER OPEN DOES NOT CHANGE THE FACT THAT IT WAS AN ATTEMPTED ARMED ROBBERY, AND THAT THIS MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ARMED ROBBERY.

THE JUDGE WILL INSTRUCT YOU, AGAIN, THAT YOU MUST DISCUSS IT, YOU MUST MAKE A UNANIMOUS DECISION, BUT I SUBMIT TO YOU THE INDICTMENT THAT YOU RETURNED JUST DAYS AGO ON [1877] ATTEMPTED ARMED ROBBERY IS THAT AGGRAVATING CIRCUMSTANCE. AND THAT BASED ON YOUR DISCUSSION OF THAT EVIDENCE AND YOUR DECISION AS TO THAT EVIDENCE, YOUR FIRST STEP WILL BE MADE AS SOON AS YOU GET IN THERE. AND THAT IS FOR ALL 12 OF YOU TO DECIDE, AND SIGN AS TO THE AGGRAVATING CIRCUMSTANCE.

MR. BANKS: YOUR HONOR, I WOULD OBJECT. THE DELIBERATION IS THE FIRST STAGE, SEPARATE AND INDEPENDENT FROM THESE DELIBERATIONS. AND I WOULD OBJECT TO THAT STATEMENT, THAT BECAUSE THEY HAVE ALREADY MADE THAT DECISION; THEY HAVE MADE IT HERE.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I BELIEVE THAT IS A PROPER INFERENCE. I AM SAYING THAT THEY HAVE TO DECIDE WHEN THEY GO IN THERE -

THE COURT: I OVERRULE THE OBJECTION.

CONTINUED ARGUMENT TO THE JURY BY MR. POPE:

AS I SAID, WHEN YOU GO BACK THERE, THE FOREMAN WILL HAVE A FORM WITH AN AGGRAVATING CIRCUMSTANCE OF A MURDER BEING COMMITTED DURING THE COMMISSION OF AN ARMED ROBBERY. AND EACH OF YOU ARE TO SIGN - AGAIN, YOU ONLY SIGN IT IF THAT IS WHAT YOU BELIEVE, AND THAT IS YOUR VERDICT. AND YOU HAVE PREVIOUSLY INDICATED THAT YOU HAVE SO FOUND.

LADIES AND GENTLEMEN, YOU HAVE HAD A TREMENDOUS AMOUNT OF EVIDENCE AS FAR AS THIS CRIME. YOU HAVE BEEN SHOWN A TREMENDOUS AMOUNT OF VIDEO. AND ONE THING I WANT TO DO IS TO URGE YOU WHEN YOU GO BACK TO LOOK AT ALL OF THE [1878] EVIDENCE, TAKE AS LONG AS YOU NEED TO MAKE A FAIR AND JUST DECISION. BUT I SUBMIT TO YOU STATE'S EXHIBIT 5 WHICH IS CALLED THE CASH TAPE VIDEO, STATE'S EXHIBIT 5 WHICH WAS THE CAMERA - YOU'VE GOT 16 CAMERA ANGLES, YOU'RE FREE TO LOOK AT ANYTHING YOU NEED TO LOOK AT BEFORE OR AFTER DURING THIS TIME TO MAKE A DETERMINATION. BUT I SUBMIT TO YOU, STATE'S EXHIBIT 5, THE CASH TAPE, TELLS YOU EVERYTHING YOU NEED TO

KNOW TO MAKE YOUR DECISION. AND I'M GOING TO SHOW YOU A BRIEF EXCERPT OF IT NOW, BUT I ASK YOU WHEN YOU GO BACK IN YOUR JURY ROOM, YOU LOOK AT IT AS MANY TIMES AS YOU NEED. AND YOU LISTEN TO IT; YOU TURN THE VOLUME UP ON THAT T.V. AS LOUD AS YOU NEED TO LISTEN SO THAT YOU CAN DETERMINE WHAT THE LAST WORDS RAY BROOME HEARD WERE.

LADIES AND GENTLEMEN, NOW I AM GOING TO PLAY JUST A BRIEF PORTION, AND I'LL BE QUITE CANDID WITH YOU, THIS IS THE CRIME OF THIS DEFENDANT. I'M NOT GOING TO PLAY THE RECOVERY, AND ALL THE PEOPLE THAT TRIED TO HELP RAY. I'M JUST GOING TO SHOW YOU THIS PORTION, AND THEN I WILL DISCUSS IT WITH YOU FURTHER.

(A PORTION OF THE VIDEO WAS SHOWN TO THE JURY)

YOU LOOK AT THE DEFENDANT, YOU LOOK AT THE CHARACTER OF THE DEFENDANT. YOU WILL HAVE THE EVIDENCE BEFORE YOU.

MY JOB STANDING BEFORE YOU NOW IS TO MAKE AN ARGUMENT BASED ON THE EVIDENCE, AND THE REASONABLE INFERENCES [1879] THAT COME FROM THAT EVIDENCE. IF I STATE SOMETHING DIFFERENT FROM WHAT YOU HAVE SEEN OR WHAT YOU REMEMBER, YOUR JOB, YOUR DUTY IS TO TAKE IT AS YOU REMEMBER IT. BUT I WANT TO POINT OUT SOME ISSUES IN THIS PARTICULAR CASE THAT I THINK MERIT YOUR CONSIDERATION.

LADIES AND GENTLEMEN, YOU'VE SEEN THE TAPE LEADING UP TO THIS. YOU'VE SEEN THE DEFENDANT IN THE STORE; YOU'VE SEEN HIM GO BACK OUT; YOU'VE HEARD TESTIMONY ABOUT HIM PULLING UP THE HOOD AS HE COMES IN THE STORE. AND THEY WANT YOU TO BELIEVE THAT THIS IS SOME KIND OF CONDITIONED RESPONSE, BUT YOU LOOK AT THE VIDEO, AND WHAT YOU SEE ON THE FIRST SHOT – IF THE WHOLE PLAN IS LET'S GO ROB A MAN, DOES IT NOT MAKE SINCE [sic] TO YOU TO SAY THIS IS A STICK-UP, GIVE ME YOUR MONEY? WHAT DO YOU SEE ON THERE? YOU SEE RAY BEHIND THE COUNTER WORKING ON HIS PAPERWORK; HE LOOKS UP, HE'S SHOT.

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[1882] **THE COURT:** I'M GOING TO ASK YOU TO DISREGARD THE LAST ARGUMENT OF COUNSEL, AND INSTRUCT YOU NOT TO CONSIDER THE OMISSION OF ANY TYPE STATEMENTS BY THE DEFENDANT ON THE VIDEO TAPE. YOU MAY PROCEED.

CONTINUED ARGUMENT TO THE JURY BY MR. POPE:

LADIES AND GENTLEMEN OF THE JURY, YOU'LL HAVE THIS EVIDENCE BACK IN THE JURY ROOM, AND YOU LOOK AT THE EVIDENCE. AND I SUBMIT TO YOU THAT THE VIDEO TAPE IS CLEAR, THERE IS NO WAY THAT THIS MAN TRIED TO GET RAY BROOME TO OPEN THE CASH REGISTER BEFORE HE SHOT HIM.

MR. BANKS: OBJECTION, AND MOVE FOR A MISTRIAL.

THE COURT: OVERRULED.

CONTINUED ARGUMENT TO THE JURY BY MR. POPE:

IT'S ABUNDANTLY CLEAR THAT THEY WENT AS FAR AS TO ELIMINATE THE ONE MAN THAT COULD OPEN THE CASH REGISTER BASED ON THE FACT THAT ULTIMATELY THEY COULD NOT GET IN IT.

LADIES AND GENTLEMEN, AGAIN IN JUDGING THE CHARACTER AND CULPABILITY OF THIS DEFENDANT, THINK ABOUT HIS CRIME, YOU THINK ABOUT WHAT HE DID. YOU SAW RAY BROOME, AND [1883] YOU SAW RAY BROOME DROP TO THE FLOOR. WHAT DOES WESLEY SHAFER DO? HE HIT HIM IN THE TEMPLE THE FIRST TIME; WHAT DOES WESLEY SHAFER DO AS MR. BROOME'S LEG IS CURLING UP, HE'S BEEN SHOT IN THE HEAD, HE GOES OVER THE COUNTER AND HE SHOOTS HIM THE SECOND TIME; HE SHOOTS HIM THE SECOND TIME SO CLOSE THAT THERE IS STIPPLING OF GUNPOWDER ON RAY BROOME'S HEAD.

ONE OF THE DEFENSE WITNESSES WOULD HAVE YOU BELIEVE THAT AIL THIS TIME THAT WAS JUST THE CARRYING ON OF THAT CONDITIONED RESPONSE. LADIES AND GENTLEMEN, BETWEEN THE FIRST SHOT 34 SECONDS, AND THE SECOND SHOT 42 SECONDS, THAT WOULD BE EIGHT SECONDS; EIGHT SECONDS BETWEEN THAT FIRST SHOT

AND THE SECOND SHOT. THE TIME THAT WE HAVE STOOD HERE.

I SUBMIT TO YOU, IT IS NOT ABOUT CONDITIONED RESPONSE, IT'S ABOUT MALICE, IT'S ABOUT EVIL INTENT; IT'S ABOUT WESLEY SHAFER'S DESIRE TO INSURE THAT RAY BROOME WAS DEAD.

I WOULD ALSO ASK YOU, AND IT'S NOT ON THIS PICTURE, WHEN YOU'RE CONSIDERING THAT, AND HIS PULSE RATE IS UP, AND HIS BRAIN IS SHUTTING DOWN, AND HE IS CONDITIONALLY RESPONDING TO VIDEO GAMES, AND HE'S SHOOTING, LOOK AT THAT VIDEO WHEN YOU GO BACK THERE. BETWEEN THE PICTURE I HAD UP AND THE PICTURE I SHOWED YOU, HE HAS GONE AS FAR AS TO PUT THE GUN BACK IN HIS POCKET BEFORE HE PULLS IT BACK OUT AND SHOOTS HIM THE SECOND TIME. HE'S STRUGGLING TO GET THE GUN BACK OUT OF HIS POCKET WHEN HE SHOOTS THE MAN AGAIN. YOU CAN [1884] CONSIDER THIS DEFENDANT'S ACTIONS, AND YOU CAN CONSIDER HIS CHARACTER.

YOU'VE HAD TESTIMONY THAT THEY DON'T BELIEVE HE PLANNED ANYTHING, THAT IT WAS JUST ALL CONDITIONED ON THE WAY HE WAS RAISED, AND THE VIDEO GAMES AND ALL OF THAT, BUT HE GOES AND BUYS BULLETS EARLIER THAT AFTERNOON. HE HAD TO GET THAT GUN AT SOME POINT. HE'S SHOWING IT TO HIS FRIENDS, HE'S SHOOTING IT OUT OF THE WINDOW EARLIER THAT EVENING. YOU SEE HIM GO IN AND OUT OF THE

STORE. AND AT SOME POINT THEY GO BACK OUT, AND HE CHOOSES TO PUT THE HOOD UP.

AND REMEMBER, AFTER THEY LEFT HE TOLD MULLINAX THAT THEY WOULDN'T GET CAUGHT. AND THEY WENT AND THEY WERE GOING TO HIDE THEIR SHIRTS.

AND YOU REMEMBER, I THOUGHT THAT WAS INTERESTING, MULLINAX SAID HE WOULDN'T GO IN THE WOODS WITH THEM. REMEMBER WHEN THEY GOT BACK HOME? HE SAID HE WOULDN'T GO IN THE WOODS WITH THEM BECAUSE HE HAD JUST SEEN WHAT HE HAD DONE TO RAY BROOME.

NOW, ANOTHER THING INTERESTING I THINK ABOUT THIS DEFENDANT'S CHARACTER YOU CAN LOOK AT FROM HIS HIDING THE WEAPON. THE SHIRT IS IN EVIDENCE. YOU REMEMBER YOU'VE GOT THE DUKE COAT, YOU'VE GOT THE TROY AIKMEN SHIRT, AND THEN YOU REMEMBER MULLINAX' SHIRT, KIND OF A SHORT SLEEVED BUTTONED UP DRESS SHIRT IN MULTI-COLORED PRINT. HE TAKES THAT SHIRT OFF AT PORTER'S HOUSE, AND GIVES THAT SHIRT TO [1885] WESLEY SHAFER AND PORTER WHEN THEY ARE GOING TO GO OUT IN THE WOODS TO HIDE STUFF. BUT THEN THE NEXT DAY WHEN THE POLICE FINDS ALL OF THE EVIDENCE, WHOSE SHIRT IS WRAPPED AROUND THE GUN? WESLEY SHAFER WRAPS MULLINAX'S SHIRT AROUND THE GUN, AND HIDES HIS AND PORTER'S SHIRTS IN THE BOTTOM OF A CREEK.

YOU CAN JUDGE THE CHARACTER OF THIS DEFENDANT; YOU CAN JUDGE HIS LEVEL OF CULPABILITY. RAY BROOME LIES DEAD, THEY TAKE HIM TO THE HOSPITAL, AND THE NEXT DAY WHERE IS WESLEY SHAFER? HE'S UP AT CASSELL'S STORE, EVERYTHING IS FINE, HE'S GOING TO THE BALL FIELD. AND THAT, TOO, IS SOMETHING YOU CAN TAKE INTO CONSIDERATION AS FAR AS CULPABILITY. THOSE THINGS ARE HAPPENING BEFORE HE IS CHARGED. THOSE THINGS ARE HAPPENING BEFORE HE HAS BEEN CAUGHT, BEFORE WE ARE HERE BEFORE YOU TODAY.

LADIES AND GENTLEMEN, OUR JOB IS TO PUT THE EVIDENCE UP BEFORE YOU, AND THE DEFENSE CERTAINLY HAS THE RIGHT TO PUT UP WHAT THEY CHOOSE. THE JUDGE WILL INSTRUCT YOU THAT YOU CAN BELIEVE THE CREDIBILITY OF ONE WITNESS AGAINST MANY, MANY AGAINST ONE. WHATEVER WAY YOU CHOOSE, YOU USE YOUR OWN COMMON SENSE, AND YOU USE YOUR OWN HUMAN NATURE TO DETERMINE WHO YOU WANT TO BELIEVE. AND WHEN THEY SIT UP HERE AND THEY ARE SELLING SOMETHING TO YOU, OR GIVING SOMETHING TO YOU, YOU USE YOUR OWN COMMON SENSE TO FILTER OUT WHO'S GOT A MOTIVE TO TELL YOU THIS; WHY WOULD THEY TELL YOU THIS; WHAT IS THEIR BIAS; WHAT IS THEIR REASON. AND YOU [1886] ULTIMATELY JUDGE THE WITNESS' CREDIBILITY.

YOU HEARD TESTIMONY ABOUT MR. SHAFER HAVING A CONDITIONED RESPONSE, THAT THIS WAS ALL ABOUT CONDITIONED RESPONSE. THAT IF

YOU HAVE A TOUGH DADDY, AND A LOVING MAMA, AND A BAD FAMILY, AND YOU PLAY VIDEO GAMES, AND YOU WATCH THESE MOVIES THEN YOU'RE GOING TO KILL RAY BROOME DOWN IN LOCKHART.

LADIES AND GENTLEMEN, DO NOT LEAVE YOUR COMMON SENSE IN THIS JURY BOX. YOU HAVE HEARD TESTIMONY ABOUT THIS CONDITIONED RESPONSE, BUT I SUBMIT THAT IF THAT HOLDS TRUE, AND AS THE WITNESS WAS SAYING THAT ULTIMATELY BECAUSE OF THESE MOVIES, YOU GO TO THE MOVIE WITH YOUR GIRLFRIEND, YOU EAT POPCORN, YOU EAT CANDY BARS, AND SO SUDDENLY KILLING IS CONDITIONED WITH GOOD THINGS. IF THAT IS TRUE, THAT IS TRULY A TERROR FOR OUR YOUNG PEOPLE.

BUT I SUBMIT THAT THIS SAME DEFENDANT IF HE WAS CONDITIONALLY TRAINED TO KILL TARGETS AS YOU WERE LEAD TO BELIEVE, WHY DIDN'T HE KILL A COUPLE OF HIS BUDDIES BACK THERE AT THE HOUSE WHEN HE SHOWED THEM THE PISTOL, WHEN HE HAD THE PISTOL EARLIER LIKE MULLINAX SAID. BUT BETTER YET, WHEN THEY ARE THERE AT THE HOT SPOT THE FIRST TIME, POWER BRAKING, PULL OUT, THE TRUCK CHOKES DOWN, THERE IS NO GAME THAT YOU FIRE UP IN THE AIR. HE'S FIRING OUT THE WINDOW. WHY WOULDN'T HE TURN BACK AROUND IN THAT PARKING LOT AND PICK HIM SOME TARGETS BECAUSE THAT'S WHAT HE IS TRAINED TO DO, [1887] THAT'S WHAT HE IS CONDITIONALLY RESPONDED TO DO.

LADIES AND GENTLEMEN, TO EQUATE THIS DEFENDANT'S ACTIONS WITH A SOLDIER IN COMBAT IS A MOCKERY TO A SOLDIER IN COMBAT, AND I HOPE YOU PUT NO STOCK AND NO FAITH IN THAT LINE. HE HAS HAD SEVERAL OPPORTUNITIES TO RELOAD THIS GUN. HE EMPTIED THE GUN, THE GUN WAS FULL. SO, HE IS HANDLING THIS GUN, BUT HE IS CONDITIONALLY RESPONDED TO PICK OUT A TARGET.

THE STATE PUT UP A WITNESS IN REPLY TODAY, AND THERE IS NOTHING HUMOROUS ABOUT THIS CASE. I THINK YOU WILL AGREE THAT WE SEE HUMOR WHEN WE ARE TIRED AND WE GET NERVOUS, BUT THERE IS NOTHING HUMOROUS ABOUT THIS CASE, BUT YOU COULDN'T HELP BUT SEE THE HUMOR IN A 26 YEAR OLD OFFICER AT THE PIZZA HUT LAST NIGHT PLAYING LETHAL ENFORCER. LADIES AND GENTLEMEN, WE DID THAT FOR A REASON. I FELT THAT BASED ON YOUR COMMUNITY EXPERIENCE, YOU MAY BE EXPOSED TO THIS, BUT I DIDN'T KNOW, SO WE GOT A WITNESS TO TAKE THE STAND THAT TELLS YOU WHAT LETHAL ENFORCER IS LIKE. IN ADDITION TO IT BEING A TOY GUN, AND PUTTING QUARTERS IN, YOU'RE AT THE PIZZA HUT AND ALL OF THAT.

THE MOST INTERESTING THING, AND IF YOU'LL REMEMBER THE EXPERT ON CONDITIONED RESPONSE NEVER TOUCHED ON THIS, HE SAID THE ONLY REQUIREMENT IS TO SHOOT, SHOOT, SHOOT. WELL, IF WE ARE TRAINING OUR YOUNG PEOPLE IN THESE GAMES, WHAT WE ARE TRAINING THEM IS DON'T KILL INNOCENT TOWNSFOLK, YOU LOSE

[1888] YOUR BADGE, YOU LOSE YOUR LIFE IF YOU KILL AN INNOCENT TOWNSFOLK.

LADIES AND GENTLEMEN, I SUBMIT THAT THESE GAMES TRAIN YOU TO STOP THE BAD GUYS. THESE GAMES TRAIN YOU TO STOP THE WESLEY SHAFERS, NOT THE RAY BROOMES.

LADIES AND GENTLEMEN, WE HAVE IN THIS CASE AN ATTEMPTED ARMED ROBBERY. BUT I SUBMIT TO YOU THAT ANOTHER CRIME WAS TAKING PLACE FAR WORSE THAN THAT. THIS MAN, IN ADDITION TO BEING A MURDERER, HE IS A THIEF, AND WHAT HE HAS STOLEN HE HAS STOLEN FROM THIS COMMUNITY, AND HE HAS STOLEN FROM THESE PEOPLE; HE HAS STOLEN THEIR HOPES AND DREAMS. HE HAS STOLEN THIS COMMUNITY'S SENSE OF SECURITY. HE WILL NEVER BE THE BEST MAN AT THIS MAN'S WEDDING. HALF OF HER LIFE IS GONE.

I WANT TO MAKE IT CLEAR THAT THIS FAMILY HAS SUFFERED, TOO. BUT THERE IS ONE DISTINCTION. THIS MAN MADE IT HIS CHOICE. HE CHOSE TO PUT THAT PISTOL TO RAY BROOME'S HEAD, NOT ONCE, BUT TWICE; AND HE BROUGHT HIS FAMILY INTO IT. THESE PEOPLE, AND THIS MAN WERE NOT GIVEN THAT CHOICE.

AND SO I KNOW IT'S DIFFICULT, BUT WHEN YOU'RE DEALING WITH THE ANGER AND THE SORROW, I WANT TO MAKE IT CLEAR THE STATE WOULD NEVER ASK YOU TO MAKE A DECISION IN ANGER. I AGREE WITH THE DEFENSE ON ONE

THING, YOU DON'T MAKE A DECISION OUT OF ANGER. YOU MAKE A DECISION OUT OF JUSTICE.

SO, WHEN YOU ARE BALANCING THIS, AND YOU'RE DEALING [1889] WITH IT, YOU'VE ULTIMATELY GOT TO LOOK AT THE CAUSE AND RESPONSIBILITY, AND WHO IS TO BE ACCOUNTABLE FOR THEIR ACTIONS.

HE SAYS HIS FAMILY IS TO BLAME; THE COMMUNITY IS TO BLAME; THOSE KIDS DOWN AT THE HOT SPOT, IF THEY HAD JUST CALLED SOMEBODY, THEY'RE TO BLAME; LAW ENFORCEMENT IS TO BLAME; SOCIETY IS TO BLAME; RAY IS TO BLAME BECAUSE IF RAY HAD JUST CALLED WHEN THE GIRLS FIRST CAME AND SAID DID YOU HEAR THEM OUT THERE SHOOTING, THERE NEVER WOULD HAVE BEEN A KILLING.

BUT, AGAIN, I SUBMIT THAT THAT DOES NOT APPEAL TO YOUR COMMON SENSE, AND HOPEFULLY THAT DOES NOT APPEAL TO YOUR SENSE OF JUSTICE, TO PUT THE BLAME FOR THE DEATH OF RAY BROOME OFF ON SOMEONE ELSE.

LADIES AND GENTLEMEN, IT WAS EXTREMELY DIFFICULT BUT IT WAS IMPORTANT, WHEN YOU HEAR ALL THESE TECHNICALITIES, IT IS IMPORTANT FOR YOU TO HEAR THAT RAY BROOME IS A PERSON, THAT HE IS AN INDIVIDUAL, THAT HE WAS A VICTIM SO THAT RAY BROOME IS NOT REMEMBERED, AS KAREN BROOME HAS TOLD YOU, THAT HE IS EVIDENCE AND YOU CAN'T TOUCH HIM.

THAT'S WHY WE BROUGHT THESE PICTURES; THAT'S WHY WE BROUGHT THE CHRISTMAS VIDEO; THAT'S WHY WE BROUGHT ALL THE DIFFERENT PICTURES, AND YOU'LL HAVE THEM IN THE JURY ROOM, OF RAY. RAY PROBABLY WOULDN'T APPRECIATE US BRINGING A PICTURE OF HIM WITH HIS HAIR IN CURLERS, BUT WE BROUGHT THAT TO YOU. [1890] WE BROUGHT THAT TO SHOW YOU THE MAN WHOSE LIFE HAS BEEN TAKEN, AND THE LOSS THAT THIS FAMILY HAS SUFFERED, AND THE HORRIBLE NATURE OF THIS MAN'S CRIME.

YOU KNOW, WHEN WE PLAYED THE CHRISTMAS VIDEO, AND KAREN WAS TELLING YOU ABOUT THE LITTLE POEM RAY WAS READING, YOU KNOW, SHE WAS EXPLAINING WHAT WAS SAID, IT WAS ALMOST EERIE WATCHING THE VIDEO, AND WATCHING RAY TALKING AND HEARING NO SOUND. AND IT OCCURS TO ME THAT THAT'S WHAT HAPPENED AFTER THIS OFFENSE. HE HAS SILENCED RAY BROOME FOREVER.YOU WILL NEVER HEAR HIM LAUGH; HE WILL NEVER PLAY A JOKE ON THE KIDS AT THE HOT SPOT, AND IT FALLS ON ME TO BE THE VOICE OF RAY BROOME.

WHEN YOU MAKE YOUR DETERMINATION, AND I DON'T PRETEND THAT THIS IS AN EASY JOB, WE KNEW THAT FROM THE BEGINNING, WE DISCUSSED IT WITH YOU FROM THE BEGINNING. WHEN YOU MAKE YOUR DETERMINATION, AND I ANTICIPATE THE DEFENSE WILL GET UP AND SPEAK, THIS WILL BE THE LAST TIME YOU HEAR FROM RAY, I ANTICIPATE THEY MAY HAVE ONE MORE TALK, AND THAT

IS THEIR OPTION, SO THIS IS MY ONE SHOT TO SPEAK TO YOU IN THIS REGARD.

BUT WHEN THEY GET UP, AND THEY TALK ABOUT LIFE IN PRISON VERSUS THE DEATH PENALTY, AND LIFE IN PRISON IS ENOUGH FOR THIS CRIME BECAUSE OF ALL THE BAD THINGS THAT HAPPENED TO HIM IN HIS LIFE IS ENOUGH, I WANT YOU TO THINK SHAFER'S MAMA, HIS SISTER, FAMILY ALL LOVE HIM, AND THEY CAN COOK A [1891] LASAGNA ON SUNDAY AND THEY CAN TAKE IT OVER TO THE JAIL, AND THEY CAN HAVE VISITATION, LOOK THEIR FAMILY IN THE FACE, LOOK THROUGH THE GLASS, AND THEY CAN SEE THIS DEFENDANT. BUT YOU HEARD FROM THIS WOMAN, THE ONLY PLACE THEY VISIT RAY IS AT THE GRAVEYARD. SO, YOU TAKE THAT INTO CONSIDERATION WHEN YOU'RE LOOKING AT JUSTICE.

LADIES AND GENTLEMEN, ONE OF THE SCARIEST THINGS, CERTAINLY THE CRIME, CERTAINLY THE VIDEO, BUT ONE OF THE SCARIEST THINGS I THINK ABOUT THAT SECOND VIDEO, THE VIDEO WHERE WE SAW THE CASH TAPE, THE HORROR AND ALL OF THE SOUND, DO YOU REMEMBER THE GIRLS THAT CAME IN AND WHEN JAMIE PALMER WAS SAYING "OH, GOD; OH, GOD; RAY, RAY" AND THE GIRLS WERE RUNNING IN AND OUT, WE'VE GOT TO GO, WE'VE GOT TO GO, AND I TELL YOU WHAT, I'VE LISTENED TO IT, YOU'VE LISTENED TO IT, AND YOU WILL HAVE A CHANCE AGAIN, BUT WHAT IS REALLY ETCHED IN MY MIND IS MONICA INMAN. REMEMBER JAMIE PICKS UP THAT PHONE AND SHE'S CALLING 911, AND MONICA INMAN

SAYS "COME ON, JAMIE, THEY MIGHT COME BACK, THEY MIGHT COME BACK".

LADIES AND GENTLEMEN, YOU ARE THE CONSCIENCE OF THIS COMMUNITY, AND YOUR VERDICT DOES SEND A MESSAGE TO UNION COUNTY, TO THE STATE. SO THAT THE NEXT TIME SOMEBODY WITH A PISTOL THINKS ABOUT LOADING UP, COMING ACROSS THAT RIVER TO LOCKHART, OVER TO JONESVILLE OR OUT TO BUFFALO OR ANYWHERE IN THIS COUNTY, AND THEY MIGHT COME BACK, THEY MIGHT COME BACK, THEY WILL REMEMBER THIS DAY, AND THEY WILL REMEMBER THIS [1892] JURY, AND THEY WILL REMEMBER THIS VERDICT.

LADIES AND GENTLEMEN, I IN NO WAY WOULD INTIMATE THAT YOU DON'T HAVE A DIFFICULT DECISION. AND I WOULD IN NO WAY INTIMATE THAT IT DOESN'T TAKE THE COURAGE OF YOUR CONVICTION TO DO IT, AND IT'S EASY FOR ME AS A LAWYER TO JUMP UP HERE AND SAY YOU OUGHT TO DO THIS, YOU OUGHT TO DO THIS, YOU OUGHT TO DO THIS. I TRY TO BRING YOU THE EVIDENCE, AND BRING YOU THE REASONS YOU OUGHT TO DO THIS.

IF YOU WANT TO LOOK FOR COURAGE, HEY, YOU KNOW, I'M JUST A CITIZEN, I DON'T WANT TO BE A JUROR, I DON'T WANT TO BE HERE, I DON'T WANT TO BE THRUST IN THE MIDDLE OF THIS; WHEN YOU'RE LOOKING FOR COURAGE, YOU LOOK AT THAT VIDEO TAPE, AND YOU LOOK AT JAMIE PALMER. SHE DIDN'T WANT TO BE THERE; SHE DIDN'T WANT TO BE INVOLVED, BUT SHE GOT ON

THAT PHONE, AND CALLED THAT 911 AND WHEN HER FRIENDS ARE LEAVING AND RUNNING AROUND AND TALKING ABOUT PEOPLE COMING BACK, SHE STAYED, AND YOU WILL HEAR HER, AND YOU'LL HEAR HER SAY "I'M SCARED, I'M SCARED", BUT SHE STAYED. SHE DID WHAT WAS RIGHT, AND WHAT WAS JUST BEYOND ANY MEASURE OF ANY COURAGE.

I'M GOING TO LEAVE YOU, LADIES AND GENTLEMEN, YOU WILL HAVE THE JURY FORM, AND THE PEN WILL BE IN YOUR HAND. YOU TOLD US IN THAT CHAIR THAT IF IT WAS JUST, THAT IF IT WAS THE RIGHT THING TO DO, THAT IF YOU FELT IN YOUR HEART IT WAS RIGHT TO SIGN THAT, THAT YOU COULD GIVE HIM DEATH. JUST LISTEN TO JAMIE'S VOICE AND YOU HEAR HER SAY "HOLD ON RAY; [1893] HOLD ON RAY, HELP'S COMING; HOLD ON RAY". HE'S NOW HOLDING ON FOR YOU. THIS FAMILY HAS HELD ON. AND THEY HOLD ON, AND RAY HOLDS ON.

LET EVERYONE KNOW THAT THIS DAY IN UNION COUNTY JUSTICE WAS DONE IN THIS CASE THAT WILL SEND A MESSAGE OF HOW UNION COUNTY HANDLES A CRIME OF THIS NATURE. THEY HOLD ON; THEY WAIT FOR YOU. WITH NO RESERVATION WHATSOEVER BASED ON WHAT WE HAVE BEFORE YOU, I ASK YOU FOR A VERDICT OF DEATH. ANYTHING LESS WOULD BE A MOCKERY TO THE MEMORY OF RAY AND HIS FAMILY.

I THANK YOU FOR YOUR SERVICE; I THANK YOU FOR YOUR ATTENTION.

THE COURT: I'M GOING TO HAVE TO LET YOU GO TO THE JURY ROOM JUST FOR A FEW MINUTES.

IN CAMERA:

THE COURT: ARE YOU READY TO MAKE A PROFFER?

MR. BANKS: PRIOR TO THE PROFFER, YOUR HONOR, WE RENEW OUR REQUEST TO BE ALLOWED TO DISCUSS RELIGION IN CLOSING ARGUMENT PURSUANT TO THE STATE OPENING THE DOOR ON THE COMMENTS OF JAMIE PALMER OF "OH, GOD; OH, GOD" IN LOOKING FOR COURAGE DURING THAT PHONE CALL.

THE COURT: I DENY THAT.

MR. BANKS: SECONDLY, YOUR HONOR, WE WOULD RENEW OUR REQUEST FOR A LIFE WITHOUT PAROLE CHARGE PURSUANT TO THE STATUTE AND FUTURE DANGEROUSNESS IN THAT IN THE SOLICITOR'S [1894] ARGUMENT HE STATED THAT JAMIE PALMER FEARED THAT "THEY MIGHT COME BACK, THEY MIGHT COME BACK". IN ADDITION TO ANY FUTURE DANGEROUSNESS WE HAD ARGUED BEFORE, THE COURT HAD RULED THAT IT WAS NOT SUFFICIENT FOR A CHARGE OF LIFE WITHOUT PAROLE.

THE COURT: LET ME HEAR FROM THE SOLICITOR ON THAT.

MR. POPE: YOUR HONOR, I THINK IT WAS CLEAR IN THE CONTEXT WE WERE TALKING ABOUT

FUTURE CRIMES NOT RELATED TO THIS DEFENDANT. IT WAS CLEAR WE WERE TALKING IN THE FUTURE CONTEXT OF PEOPLE OTHER THAN THIS DEFENDANT.

THE COURT: I DENY THE MOTION.

MR. BANKS: YOUR HONOR, FINALLY WE WOULD ASK THAT THE COURT REOPEN THE DEFENSE CASE DURING THE SENTENCING TO PRESENT ISSUES OF STATISTICS AND WITNESSES AS TO THE DEATH PENALTY NOT BEING A DETERRENT PURSUANT TO THE SOLICITOR'S COMMENT THAT IT WOULD, A, KEEP OTHERS FROM COMING BACK INTO THE COMMUNITY AND DOING THE SAME THING, AND SAYING THAT IT WOULD SEND A MESSAGE TO THE COMMUNITY TO KEEP OTHERS FROM DOING THE SAME. DETERRENCE IS NOT AN ISSUE UNLESS BROUGHT IN ISSUE BY THE STATE; THE SOLICITOR HAS DONE SO, AND WE ASK FOR TIME TO PRESENT EVIDENCE TO REBUT THAT.

IN THE ALTERNATIVE, WE WOULD ASK THE COURT TO INSTRUCT THE JURY TO COMPLETELY DISREGARD ANY COMMENTS BY THE SOLICITOR IN REGARD TO DANGER TO THE COMMUNITY.

THE COURT: LET ME HEAR FROM THE SOLICITOR ON THAT.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I [1895] CAREFULLY REVIEWED THE CURRENT STATE LAW BEFORE MY ARGUMENT.

YOUR HONOR, I CALL THE COURT'S ATTENTION TO STATE V. RICKY GEORGE. YOUR HONOR, THE

ISSUE OF THEM BEING ABLE TO REOPEN THE CASE TO –

MR. BANKS: HAVE YOU GOT A COPY OF THE CASE?

MR. POPE: THAT'S THE ONLY COPY. THERE IS NOTHING TO PREVENT THE DEFENSE FROM ARGUING THAT IT IS NOT A DETERRENT. THEY CERTAINLY HAD THE OPPORTUNITY, IF THEY HAD CHOSE TO, TO PUT UP EVIDENCE IN THAT REGARD PREVIOUSLY. I THINK THE CASES HAVE CLEARLY HELD THAT THAT IS APPROPRIATE ARGUMENT.

THE COURT: HAVE YOU GOT ANYTHING DIFFERENT?

MR. BANKS: NO, SIR, JUST THAT THE ISSUE IN THE GEORGE CASE AND CASES OF THAT NATURE IS ARGUING OUTSIDE THE EVIDENCE. THERE IS NO EVIDENCE THAT IT IS A DETERRENT OR THAT IT IS NOT A DETERRENT. THERE IS NO REASON FOR US TO REBUT EVIDENCE THAT ISN'T THERE.

THE COURT: WELL, AS OUR COURTS OFTEN DO, THEY SAY YOU CAN'T INTRODUCE THAT TYPE EVIDENCE, BUT YOU CAN ARGUE IT. I'M NOT QUESTIONING THE LOGIC OF OUR HIGHER COURTS, BUT I'M GOING TO DENY YOUR MOTION.

MR. BANKS: I'M NOT ARGUING AGAINST YOUR RULING, BUT IF I COULD PROTECT THE RECORD?

THE COURT: YES, SIR.

MR. BANKS: IT CONCERNS ME GREATLY THAT THE STATE [1896] IS ALLOWED TO MAKE THE STATEMENT "THEY MIGHT COME BACK; THEY MIGHT COME BACK", AS NOT BEING FUTURE DANGEROUSNESS, AND THEN ADDING DETERRENT AND THAT IN THE SAME LANGUAGE. IT SEEMS TO ME THAT THOSE ARE INCONSISTENT; AND BASED UPON THAT, I THINK THE STATE AT THE VERY LEAST SHOULD HAVE TO CHOOSE BETWEEN MAKING A DETERRENT ARGUMENT, WHICH INCLUDES FUTURE DANGEROUSNESS, OR NOT ARGUING FUTURE DANGEROUSNESS AND, THEREFORE, NOT MAKING IT A DETERRENT.

I THINK IT'S PREJUDICIAL TO DUE PROCESS TO BE ABLE TO ARGUE ONE, AND MAKE A STATEMENT THAT COULD GO TO FUTURE DANGEROUSNESS, BUT I MEAN IT AS A DETERRENT.

THE STATEMENT BY THE SOLICITOR WAS THAT JAMIE PALMER SAID "THEY MIGHT COME BACK", AND THAT WAS PRE-ARREST. AND HE'S USING THOSE SAME WORDS TO ARGUE DETERRENCE, THEN THOSE WORDS PRE-ARREST ARE IN THE ARGUMENT, AND THAT GOES TO FUTURE DANGEROUSNESS. IF HE'S GOING TO ARGUE, OH, I DIDN'T MEAN WESLEY, THEN IT IS A QUESTION OF DETERRENCE.

THE COURT: WELL, I LISTENED VERY CAREFULLY BECAUSE I HAVE TO ADMIT I HAD SOME CONCERN WHEN THAT ARGUMENT WAS ENTERED INTO AS TO WHETHER WE HAD CROSSED

THE LINE. YOU SAY IT DID. I FIND THAT IT COMES CLOSE, BUT DID NOT; SO, I DENY YOUR MOTION.

* * *

[1906] **ARGUMENT OF THE JURY BY MR. ALL**

THE FIRST CHAPTER OF THE BOOK, WE TALKED ABOUT HOW THAT CHAPTER ENDED. THE SECOND CHAPTER OF THE STORY, WE KNOW THAT IT ENDED IN A WAY THAT WESLEY SHAFER IS GOING TO DIE IN PRISON; WESLEY SHAFER IS GOING TO DIE IN PRISON. THE QUESTION IS WILL THE STATE EXECUTE HIM OR WILL HE JUST DIE IN PRISON. THAT'S YOUR DECISION.

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[1908] WESLEY SHAFER IS LEAVING PRISON IN A PINE BOX. I HATE TO SAY IT, BUT HE IS. WE JUST ASK THAT HE BE ABLE TO SPEND OUT HIS NATURAL LIFE THERE, AND WE DON'T TEACH OUR CHILDREN SOMETHING ABOUT VIOLENCE THAT THEY SHOULD NOT LEARN.

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[1910] **ARGUMENT TO THE JURY BY MR. NETTLES**

WE THOUGHT THAT BEFORE YOU MADE A DECISION AS GRAVE AS THIS THAT YOU WOULD WANT TO KNOW SOMETHING ABOUT THE LIFE OF THE MAN THAT THE GOVERNMENT LAWYERS ARE ASKING YOU TO KILL. AND IN ORDER TO DO THAT WE BROUGHT IN MR. PATRICK GOLDSMITH FROM LANCASTER, SOUTH CAROLINA, AND HE TALKED TO YOU ABOUT THE FACT, AND THIS IS IMPORTANT,

THAT HE HAD IDENTIFIED ABUSE IN WESLEY SHAFER BEFORE THE SHOOTING TOOK PLACE. THIS IS NOT SOMETHING THAT WAS SORT OF COOKED UP BY SOME COURT APPOINTED LAWYERS. THIS IS SOMETHING THAT WAS THERE BEFORE THIS SHOOTING TOOK PLACE. IT'S IMPORTANT FOR THAT REASON. IT WAS THERE BEFORE THE SHOOTING TOOK PLACE, AND IT WAS IMPORTANT TO UNDERSTAND WHAT IT DOES TO CHILDREN.

MR. GOLDSMITH TOLD YOU ABOUT THE ABUSE, POST TRAUMATIC STRESS DISORDER, AND HOW THAT RELATED TO IMPULSE CONTROL. IMPULSE CONTROL IS A FANCY WORD FOR THE REASON THAT SOME OF US DON'T DO THINGS LIKE GO IN A CONVENIENCE STORE AND KILL A WONDERFUL MAN. AND IT'S BEEN INSTILLED IN US, THOSE OF US WHO HAVE BEEN FORTUNATE ENOUGH NOT TO HAVE BEEN ABUSED.

ALCOHOL. YOU KNOW, THERE IS A REASON THAT WE DON'T LET OUR KIDS DRINK UNTIL THEY ARE 21. THEY CAN'T HANDLE THE RESPONSIBILITY. A [sic] 18 YEAR OLD IS DRINKING, HAS AN ADDICTION PROBLEM TO ALCOHOL AND DRUGS BECAUSE HE'S TRYING TO DO SOMETHING ABOUT THE ABUSE INSIDE. IF YOU'VE NEVER KNOWN ANYBODY THAT WAS TORTURED INSIDE, YOU'RE LUCKY. BUT THERE ARE THOSE AMONG US THAT HAVE THINGS THAT HAVE HAPPENED TO [1911] THEM THAT CAUSED THINGS TO BE DIFFERENT INSIDE OF THEM, AND THAT PERSON IS WESLEY SHAFER.

THERE IS A REASON THAT WE CAN'T DRINK UNTIL 21, AND THE GOVERNMENT ENFORCES LAWS ABOUT PEOPLE DRINKING BEFORE THEY ARE 21. BUT THEY DON'T HAVE A PROBLEM WITH PUNISHING SOMEONE THAT'S 18 YEARS OLD, PUTTING A 19 YEAR OLD IN PRISON UNTIL HE IS DEAD.

WE TALKED ABOUT THE ANGER FROM HIS FATHER. THE ANGER FILLED HIM AND ALL OF THESE THINGS, ABUSE, ALCOHOL, ANGER GO TO IMPULSE CONTROL. YOU HAVE NO IMPULSE CONTROL BECAUSE YOU HAVE BEEN BEATEN; YOU DRANK TO SUPPRESS THAT, AND YOU'RE ANGRY AT YOUR DAD. YOU TAKE ACTION WITHOUT EMOTION.

FURTHER, LIEUTENANT COLONEL GROSSMAN TALKED ABOUT CONDITIONED RESPONSE. THERE IS A REASON THAT WHENEVER YOU BRING A POLICE OFFICER IN THAT HASN'T BEEN BEATEN, AND ABUSED AND BURNED THAT HE CAN GO PLAY A VIDEO GAME, AND TALK ABOUT IT CLINICALLY. IT'S NOT JUST THE VIDEO GAMES. IT'S THE VIDEO GAMES, AND THE ABUSE.

WESLEY SHAFER SAW THINGS DIFFERENTLY, AND IT'S TIME THAT HE BE TAUGHT THAT THAT BEHAVIOR IS NOT ACCEPTABLE. AND YOU CAN PUT HIM SOME PLACE UNTIL HE IS DEAD, WHERE HE WILL HAVE THE OPPORTUNITY EVERY SINGLE DAY TO THINK ABOUT WHAT HE HAS DONE. LIFE IN PRISON UNTIL DEATH.

WHAT YOU WERE SHOWN IS THAT YOU HAVE A CONDITIONED [1912] RESPONSE. WESLEY SHAFER IS A PRODUCT OF CONDITIONED RESPONSE, NO

IMPULSE CONTROL, ACTION WITHOUT EMOTION. HIS HEART RATE GOES UP, HE DOES SOMETHING THAT HE DOESN'T UNDERSTAND. AND WHEN THE DETECTIVE CAME IN HERE, HE SAT ON THE STAND AND HE SAID "I ASKED HIM WHY DID YOU DO THAT, AND HE SAID I DON'T KNOW, I'VE BEEN SITTING IN THE WOODS TRYING TO FIGURE IT OUT, I JUST SNAPPED".

YOU KNOW, WESLEY SHAFER DOESN'T UNDERSTAND CONDITIONED RESPONSE. WESLEY SHAFER DIDN'T UNDERSTAND THAT THEY COULD BEAT A CHILD FOR 18 YEARS, AND SOMETHING WRONG IS GOING TO HAPPEN. HE DOESN'T KNOW ANY BETTER BECAUSE HIS DAD BEAT HIS SISTER, TOO. THAT'S WESLEY SHAFER'S LIFE.

ALL OF A SUDDEN WESLEY SHAFER DOES SOMETHING THAT HE KNOWS IS WRONG, AND HE CAN'T FIGURE OUT WHY. I HOPE, WE HOPE, AND WE'RE NOT SAYING THIS IS AN EXCUSE, WE'RE NOT SAYING THAT WESLEY SHAFER SHOULDN'T BE PUNISHED FOR THINGS HE CHOSE AND DECIDED TO DO, WE'RE JUST ASKING YOU NOT TO PUNISH HIM FOR THINGS HE DIDN'T CHOOSE TO DO, THINGS HE DIDN'T DECIDE TO DO. HE DIDN'T CHOOSE TO BE RICKY SHAFER'S SON; HE DIDN'T MAKE THAT DECISION.

HE SHOULD BE PUNISHED FOR THE DECISION HE MADE; HE SHOULD BE PUNISHED FOR THE DECISIONS HE MADE THAT YOU WATCHED ON THESE TELEVISIONS, AND HE SHOULD BE PUNISHED WITH

LIFE IMPRISONMENT. THAT'S THE DECISION HE MADE.

WE'RE GOING TO ASK YOU NOT TO PUNISH HIM FOR THE [1913] DECISIONS HE DIDN'T MAKE. AND WE'RE NOT EXCUSING ANYTHING.

THAT'S EXACTLY WHAT I JUST TALKED ABOUT, WHEN YOU GET ALL OF THIS, WHEN YOU HAVE ARMED ROBBERY WITH A CONDITIONED RESPONSE YOU GET A STATEMENT FROM WESLEY SHAFER LIKE "I JUST DON'T KNOW; I'VE BEEN SITTING IN THE WOODS TRYING TO FIGURE IT OUT". THAT'S WHAT THE DETECTIVE SAID HE SAID. THAT'S WHAT A GOVERNMENT EMPLOYEE SAID HE SAID.

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THE JUDGE IS GOING TO TELL YOU THAT THERE ARE MITIGATORS THAT YOU MUST CONSIDER. YOU MUST CONSIDER THE FACT THAT HE HAS NO PRIOR SIGNIFICANT CRIMINAL HISTORY. WESLEY SHAFER HAS NEVER BEEN TO THE DEPARTMENT OF CORRECTIONS. THIS IS NOT THE REVOLVING DOOR GUY; HE ISN'T THE GUY THAT IS PUT IN PRISON, HE GOT OUT AND DID ANOTHER CRIME. THIS ISN'T THE MAN FOR WHICH THE TERM REVOLVING DOOR IN PRISON WAS TERMED.

WESLEY SHAFER IS GOING TO GO TO PRISON AND STAY THERE. THERE IS NO SIGNIFICANT HISTORY OF VIOLENT CRIMES.

UNDER THE INFLUENCE OF A MENTAL OR EMOTIONAL

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[1914] I KNOW NONE OF YOU WENT INTO A CONVENIENCE STORE AND SHOT ANYBODY, AND THAT'S WHY YOU ARE NOT IN PRISON FOR THE REST OF YOUR LIFE. BUT EVERYBODY THAT IS 18 YEARS OLD HAS DONE SOME THINGS THEY WISH THEY HADN'T DONE; AND WESLEY SHAFER WISHES HE HADN'T DONE IT.

* * *

BUT Y'ALL DON'T HAVE TO DO THAT; YOU DON'T HAVE TO DO THAT. AS A MATTER OF FACT, THE LAW SAYS THAT YOU CAN GIVE LIFE FOR ANY REASON AT ALL. YOU'VE JUST GOT A GUT FEELING, YOU KNOW, THAT MAYBE WESLEY SHAFER MIGHT BE ABLE TO PULL OUT OF THIS DIVE; THERE'S SOME REDEEMING QUALITIES TO HIM THAT [1915] MAYBE IF WE JUST PUT HIM IN A STRUCTURED ENVIRONMENT WHERE HE'S NOT GOING TO GET A GUN, HE'S NOT GOING TO GET ANY ALCOHOL, HE'S NOT GOING TO GET IN FRONT OF A CONVENIENCE STORE CLERK, HE'S NOT EVEN GOING TO GET IN FRONT OF A VIDEO GAME, THAT MAYBE IF WE PUT HIM THERE, SOMETHING GOOD MIGHT HAPPEN. FOR NO OTHER REASON THAN THAT, YOU CAN GIVE LIFE. OR THE FACT THAT THERE ARE THE PRESENCE OF FOUR STATUTORY MITIGATORS.

WHAT IS THE DECISION MAKING PROCESS THAT YOU GO THROUGH. YOU CONVICTED HIM OF MURDER, YOU'VE DONE THAT. YOU DID THAT EARLIER. IF YOU FIND THERE ARE NO AGGRAVATORS, THERE'S GOING TO BE A SHEET BACK THERE YOU

CAN SIGN, ALL 12 OF YOU, AND FIND STATUTORY AGGRAVATOR. YOU'RE GOING TO FIND A STATUTORY AGGRAVATOR, YOU'RE GOING TO FIND THAT.

SO, YOU'VE FOUND A STATUTORY AGGRAVATOR, NOW WHAT DECISION DO YOU HAVE TO MAKE? YOU HAVE TO MAKE THE DECISION OF WHETHER THE MITIGATORS, THESE, ARE JUST ENOUGH THAT YOU CAN SEND HIM, MAKE HIM GO TO PRISON WITH MEN FOR THE REST OF HIS LIFE UNTIL HE DIES OR WHETHER YOU SENTENCE HIM TO DEATH. IT'S JUST A MATTER OF WHERE HE DIES.

I'M ASKING FOR A LITTLE BIT OF MERCY. I'M ASKING FOR THE SMALL AMOUNT OF MERCY THAT IT TAKES TO MAKE A 19 YEAR OLD DIE IN PRISON. I'M ASKING FOR YOU TO LOOK FOR THAT. I'M ASKING FOR THE SMALLEST AMOUNT. WHEN THEY SAY GIVE LIFE, HE'S NOT GOING HOME. YOU CAN FORGIVE HIM IF YOU WANT TO. [1916] THAT'S YOUR DECISION.

I'M JUST ASKING FOR THE SMALLEST AMOUNT OF MERCY IT TAKES TO MAKE A MAN, A CHILD SPEND THE REST OF HIS LIFE IN PRISON.

AND LET'S TALK ABOUT PRISON. IS THERE ANYONE AMONG US WHO WANTS TO SPEND THE REST OF OUR LIFE IN PRISON?

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BE THE ONE PERSON THAT LAYS THE PEN DOWN AND SAY I WANT TO BE REMEMBERED FOR HAVING THE SMALL AMOUNT OF MERCY IT TOOK TO SEND A 19 YEAR OLD TO PRISON FOR THE REST

OF HIS LIFE; THAT'S HOW I WANT TO BE REMEMBERED.

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[1917] **CHARGE TO THE JURY BY THE COURT:**

I'M GOING TO ASK YOU NOW TO GIVE ME YOUR ATTENTION. I APPRECIATE THE ATTENTION YOU HAVE GIVEN US ALL TO THIS POINT.

AS I TOLD YOU EARLIER, I MAY IN THIS INSTRUCTION ALSO USE THE WORD DEFENDANT, AND I AM, OF COURSE, TALKING ABOUT MR. WESLEY AARON SHAFER IF I USE THAT WORD.

THERE ARE TWO RECOMMENDATIONS THAT YOU ARE TO CONSIDER IN THIS CASE. ONE IS THE DEATH PENALTY, THE OTHER IS LIFE IMPRISONMENT. YOU ARE ASKED IN YOUR DETERMINATION OF THIS TO DETERMINE THE EXISTENCE OR NONEXISTENCE OF ANY STATUTORY AGGRAVATING CIRCUMSTANCES, AND I WILL EXPLAIN THAT TO YOU IN A MOMENT.

I WILL REMIND YOU, OF COURSE, THIS IS A TWO PART TRIAL, AND THIS PART IS IN ESSENCE A CONTINUATION OF WHAT HAS ALREADY GONE ON IN THE GUILT PHASE. THE MATTERS YOU HEARD IN THE GUILT PHASE HAVE BEEN INCORPORATED, THEY WEREN'T COMPLETELY RE-PRESENTED, BUT THEY HAVE BEEN PULLED INTO OR INCORPORATED IN THIS TRIAL. SO, ALL OF THE EVIDENCE YOU'VE HEARD IN BOTH PHASES WILL BE FOR YOUR CONSIDERATION OF THE PENALTY IN THIS PHASE.

[1918] I TOLD YOU BEFORE, AND I REMIND YOU THAT I AM THE SOLE JUDGE OF THE LAW, AND YOU MUST TAKE, ACCEPT, AND APPLY THE LAW AS I CHARGE IT TO YOU. AS BEFORE, YOU ARE THE SOLE JUDGE OF THE FACTS. AND YOU ARE THE SOLE JUDGES AND DETERMINERS OF THE RECOMMENDATION.

I HAVE NO OPINION ABOUT THE FACTS; I HAVE NO OPINION ABOUT YOUR RECOMMENDATION. YOU ARE NOT TO TAKE FROM ANYTHING I HAVE SAID OR DONE THROUGHOUT THIS TRIAL AS BEING AN INDICATION OF MY OPINION ON EITHER; THE LAW DOES NOT LET ME HAVE SUCH AN OPINION; IT IS YOUR JOB, AND I WILL NOT INVADE YOUR PROVINCE.

EARLIER I CHARGED YOU AS TO THE OFFENSE OF ATTEMPTED ARMED ROBBERY, AND I DEFINED A DEADLY WEAPON FOR YOU. I TOLD YOU HOW TO EVALUATE EXPERT TESTIMONY. I TOLD YOU EARLIER ABOUT THE CREDIBILITY AND BELIEVABILITY OF WITNESSES, AND HOW YOU CONSIDER AND EVALUATE CREDIBILITY. I TOLD YOU EARLIER HOW YOU ASSESS A STATEMENT ALLEGED TO HAVE BEEN MADE BY ONE CHARGED WITH AN OFFENSE. THERE HAS BEEN AN ADDITIONAL STATEMENT PRESENTED THAT WAS MADE BY MR. SHAFER IN THIS PART OF THE TRIAL, AND YOU CONSIDER THAT STATEMENT UNDER THE SAME GUIDELINES AS I TOLD YOU TO CONSIDER ANY STATEMENTS THAT CAME IN, ALLEGED STATEMENTS THAT CAME IN IN THE GUILT PHASE.

I WILL AGAIN TALK TO YOU ABOUT THE BURDEN OF PROOF, BEYOND A REASONABLE DOUBT. I DEFINED FOR YOU EARLIER THAT THE [1919] STANDARD OF PROOF IN A CASE OF THIS TYPE IS THAT OF BEYOND A REASONABLE DOUBT. THAT BEING THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

WHEN YOU DELIBERATE IN THIS STAGE, YOU WILL HAVE SOMETHING YOU DID NOT HAVE BEFORE. YOU HAD THE INDICTMENTS, YOU WILL NOT HAVE THEM AT THIS TIME, BUT YOU WILL HAVE SOMETHING CALLED A STATUTORY INSTRUCTION SHEET. IT HAS BEEN PREPARED TODAY, I HAVE SIGNED IT, AND DATED IT. IT IS A GUIDELINE FOR YOU TO FOLLOW IN FOLLOWING MY ORAL INSTRUCTIONS. I WILL GO OVER THOSE WITH YOU.

IN DETERMINING WHETHER OR NOT TO IMPOSE UPON MR. SHAFER THE PENALTY OF LIFE IMPRISONMENT OR DEATH, YOU SHOULD FIRST MAKE CERTAIN DETERMINATIONS REGARDING STATUTORY AGGRAVATING CIRCUMSTANCES.

I TELL YOU THAT LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE DEFENDANT.

THE LAW HAS ESTABLISHED, OUR LEGISLATURE HAS, CERTAIN STATUTORY AGGRAVATING CIRCUMSTANCES. THERE IS ONLY ONE THAT APPLIES IN THIS CASE. I AM NOT GOING TO GO OVER ALL OF THEM, BUT THE ONE THAT WOULD APPLY IN THIS CASE, IF YOU SO FIND, AS AN AGGRAVATING CIRCUMSTANCE IS THAT A MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ATTEMPTED

ARMED ROBBERY, AN ATTEMPTED ROBBERY WHILE ARMED WITH A DEADLY WEAPON. THAT IS THE ONLY AGGRAVATING CIRCUMSTANCE YOU MAY CONSIDER.

[1920] THESE INSTRUCTIONS THAT I WILL GO OVER WITH YOU IN A MINUTE STATE THAT IF YOU DO NOT UNANIMOUSLY AS A JURY FIND THE EXISTENCE OF ONE AGGRAVATING CIRCUMSTANCE; THAT IS, IF YOU DO NOT FIND THE EXISTENCE OF THAT AGGRAVATING CIRCUMSTANCE, YOU WILL INDICATE ON THE SENTENCE SHEET THAT YOU HAVE SO FOUND, PART ONE, AND I WILL GO OVER THAT WITH YOU IN A MOMENT. THAT HAS TO DO WITH THE VERDICT ON AGGRAVATING CIRCUMSTANCE. IF YOU DO NOT UNANIMOUSLY FIND THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE AS SET FORTH ON THE FORM, YOU DO NOT NEED TO GO ANY FURTHER.

IF YOU FIND UNANIMOUSLY THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, YOU SHOULD SO INDICATE ON PART B OF THAT FORM. AND IF YOU DO THAT, AND IT MUST BE SIGNED BY EACH MEMBER OF THE JURY, IT HAS TO BE UNANIMOUS; IF YOU FIND THAT, YOU WILL GO FURTHER AND CONTINUE YOUR DELIBERATIONS.

ONCE YOU HAVE UNANIMOUSLY FOUND AND SIGNED AS TO THE PRESENCE OF AN AGGRAVATED CIRCUMSTANCE, YOU THEN FURTHER DELIBERATE, AND DETERMINE WHETHER OR NOT WESLEY AARON SHAFER SHOULD BE SENTENCE [sic] TO LIFE IMPRISONMENT OR DEATH.

I KEEP USING THE WORD STATUTORY AGGRAVATING CIRCUMSTANCE. I'M GOING TO TALK TO YOU IN A MOMENT ABOUT HOW YOU EVALUATE THAT, AND AFTER THAT I WILL GO OVER WHAT ARE CALLED MITIGATING CIRCUMSTANCES.

A STATUTORY AGGRAVATING CIRCUMSTANCE IS A FACT, AN [1921] INCIDENT, A DETAIL OR AN OCCURRENCE WHICH THE GENERAL ASSEMBLY HAS DECLARED BY STATUTE WHICH WOULD MAKE WORSE; THAT IS, AGGRAVATE THE OFFENSE OF MURDER WHEN THE TWO OCCUR IN COMBINATION, OR IF ONE OCCURRED IN THE COMMISSION OF THE OTHER. IN OTHER WORDS, IT IS SOMETHING WHICH INCREASES THE ENORMITY OR ADDS TO THE INJURIOUS CONSEQUENCE OF THE OFFENSE. IF YOU FIND THE EXISTENCE BEYOND A REASONABLE DOUBT OF THE STATUTORY AGGRAVATING CIRCUMSTANCE, THEN YOU ARE PERMITTED, BUT YOU ARE NOT REQUIRED, TO CONSIDER THE DEATH PENALTY.

THERE ARE THREE CONDITIONS THAT YOU SHOULD CONSIDER IN REACHING YOUR DECISION. FIRST, WHETHER OR NOT THERE HAVE BEEN PROVEN THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE. NEXT, WHETHER THE DEFENDANT HAS PROVEN BY ANY EVIDENCE THE EXISTENCE OF A STATUTORY MITIGATING CIRCUMSTANCE WHICH I WILL GO OVER WITH YOU IN JUST A MOMENT. AND, THIRD, WHETHER OR NOT FOR ANY REASON OR NO REASON AT ALL MR. SHAFER SHOULD BE SENTENCED TO LIFE IMPRISONMENT RATHER THAN TO DEATH BY ELECTROCUTION.

A STATUTORY MITIGATING CIRCUMSTANCE IS A FACT, INCIDENT, DETAIL OR OCCURRENCE WHICH THE GENERAL ASSEMBLY HAS DECLARED BY STATUTE WHICH WOULD REDUCE THE SEVERITY OF THE OFFENSE OF MURDER. IN OTHER WORDS, IF IT IS A CIRCUMSTANCE RECOGNIZED BY STATUTE, AND IS ONE WHICH IN FAIRNESS AND MERCY MAY BE CONSIDERED AS EXTENUATING OR AS REDUCING THE DEGREE OF MORAL CULPABILITY FOR THE COMMISSION OF THE ACT OF MURDER. [1922] A MITIGATING CIRCUMSTANCE IS NOT JUSTIFICATION NOR EXCUSE FOR THE MURDER.

IN THIS CASE THERE ARE FOUR MITIGATING CIRCUMSTANCES, FOUR STATUTORY MITIGATING CIRCUMSTANCES THAT YOU MAY CONSIDER. THEY ARE, ONE, THE DEFENDANT HAS – THESE ARE THE CIRCUMSTANCES YOU MAY CONSIDER: WHETHER THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF A PRIOR CRIMINAL CONVICTION INVOLVING THE USE OF VIOLENCE AGAINST ANOTHER PERSON; WHETHER THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE; YOU CAN CONSIDER, THIS IS THE THIRD ONE, THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT, OR TO CONFORM HIS CONDUCT TO THE REQUIREMENT OF THE LAW WAS SUBSTANTIALLY IMPAIRED; AND YOU CAN CONSIDER THE AGE AND MENTALITY OF THE DEFENDANT AT THE TIME OF THE CRIME.

AND THESE ARE SET FORTH ON THE FORMS THAT YOU WILL HAVE IN YOUR JURY ROOM FOR CONSIDERATION.

AS TO AGGRAVATING CIRCUMSTANCES, THESE YOU MUST FIND BEYOND A REASONABLE DOUBT. AS TO THE STATUTORY AGGRAVATING CIRCUMSTANCE, YOU MUST FIND THAT BEYOND A REASONABLE DOUBT.

AS I SAY, YOU MAY ALSO CONSIDER THE STATUTORY MITIGATING CIRCUMSTANCES, AND YOU CAN CONSIDER ANY OTHER MITIGATING CIRCUMSTANCES WHICH IS SUPPORTED BY THE EVIDENCE IN THIS CASE.YOU DO NOT HAVE TO FIND MITIGATING [1923] CIRCUMSTANCES BEYOND A REASONABLE DOUBT.

A STATUTORY MITIGATING CIRCUMSTANCE, AS I TOLD YOU, IS ONE ENACTED BY OUR LEGISLATURE. A NON-STATUTORY MITIGATING CIRCUMSTANCE IS ONE WHICH IS NOT PROVIDED FOR BY THE STATUTE, BUT IS ONE WHICH MR. SHAFER CLAIMS, AND SERVES THE SAME PURPOSE.

WHILE THERE MUST BE SOME EVIDENCE WHICH SUPPORTS A FINDING BY YOU THAT A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE EXISTS, AGAIN, YOU NEED NOT FIND THE EXISTENCE OF SUCH BEYOND A REASONABLE DOUBT.

IN REACHING YOUR DECISION AS TO WHICH SENTENCE TO RECOMMEND, YOU WILL CONSIDER

THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. WHILE AN AGGRAVATING CIRCUMSTANCE MUST BE FOUND BEFORE YOU COULD EVEN CONSIDER RECOMMENDING THE DEATH PENALTY, ONCE SUCH A FINDING IS MADE BEYOND A REASONABLE DOUBT, YOU MAY RECOMMEND A SENTENCE OF LIFE – WELL, LET ME START OVER.

IF YOU FIND AN AGGRAVATING CIRCUMSTANCE, A STATUTORY AGGRAVATING CIRCUMSTANCE WHICH MUST BE FOUND BEYOND A REASONABLE DOUBT WHICH IS ONLY HERE ATTEMPTED ARMED ROBBERY – MURDER WHILE IN THE COMMISSION OF THE ATTEMPTED ARMED ROBBERY, IF YOU GO FURTHER AND FIND THE EXISTENCE OF AN ALLEGED STATUTORY MITIGATING CIRCUMSTANCE, WHICH I TOLD YOU NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT, IN AND OF ITSELF THAT IS NOT A BAR TO THE IMPOSITION OF THE DEATH [1924] PENALTY.

IF YOU SHOULD CONCLUDE THAT THE STATUTORY AGGRAVATING CIRCUMSTANCE EXISTS, THE QUESTION THEN IS WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE IN PRISON FOR ANY REASON OR NO REASON AT ALL. IT HAS TRADITIONALLY BEEN REFERRED TO THE RETURNING OF A VERDICT OF LIFE IMPRISONMENT IN THOSE CIRCUMSTANCES FOR NO REASON AT ALL AS BEING A RECOMMENDATION OF MERCY. AND IF YOU FEEL THAT SHOULD BE YOUR VERDICT UNANIMOUSLY, THEN YOU WOULD RECOMMEND LIFE IMPRISONMENT, AND THAT VERDICT WOULD BE SIGNED BY THE FOREMAN ALONE.

IN OTHER WORDS, YOU MAY CHOOSE TO RECOMMEND LIFE IMPRISONMENT IF YOU FIND A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE, OR YOU MAY CHOOSE TO RECOMMEND LIFE IMPRISONMENT SIMPLY AS AN ACT OF MERCY.

IN ANY INSTANCE, SHOULD YOU CHOOSE TO RECOMMEND LIFE IMPRISONMENT, YOUR DECISION MUST BE A UNANIMOUS ONE, BUT THE FOREMAN SOLELY WOULD BE REQUIRED TO SIGN THE FORM.

NOW, IN THIS PART OF THE TRIAL THE STATE HAS PRESENTED CERTAIN PREVIOUS CONVICTIONS OF MR. SHAFER. THIS EVIDENCE SHOULD NOT BE CONSIDERED AS SUBSTANTIVE EVIDENCE OF AN AGGRAVATING CIRCUMSTANCE, BUT IF YOU'RE CONVINCED THAT THE DEFENDANT COMMITTED THOSE OFFENSES, THEN YOU MAY CONSIDER THOSE AS EVIDENCE OF HIS CHARACTER, HIS CHARACTERISTICS. THEY MAY BE CONSIDERED ALONG WITH ALL OF THE OTHER EVIDENCE, [1925] AND YOU MAY GIVE THEM WHATEVER WEIGHT YOU DEEM PROPER UNDER THE CIRCUMSTANCES OF THIS CASE.

I INSTRUCT YOU, AND EMPHASIZE TO YOU AGAIN, THE FACT THAT MR. SHAFER EXERCISED HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY IN HIS OWN BEHALF IS NOT TO BE CONSIDERED BY YOU IN ANY WAY IN YOUR DELIBERATION, AND IS NOT TO BE UTILIZED IN YOUR CONSIDERATION OF THE QUESTION OF WHAT SENTENCE SHOULD BE IMPOSED. MR. SHAFER HAD AN ABSOLUTE RIGHT

TO REMAIN SILENT UNDER OUR CONSTITUTION. THE EXERCISE BY HIM OF THAT RIGHT CANNOT AND MUST NOT BE CONSIDERED BY YOU IN ANY FASHION IN YOUR DELIBERATION; IT CANNOT BE USED AGAINST HIM IN ANY RESPECT WHATSOEVER.

YOU ARE TO REACH NO INFERENCE, AND DRAW NO CONCLUSION WHATEVER FROM THE FACT THAT HE EXERCISED HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT. YOU CANNOT EVEN DISCUSS THAT FACT IN THE JURY ROOM.

THE BURDEN OF PROOF IS UPON THE STATE TO PROVE BEYOND A REASONABLE DOUBT THE AGGRAVATING CIRCUMSTANCE AS OUTLINED TO YOU.

THE EXERCISE BY MR. SHAFER OF HIS RIGHT NOT TO TESTIFY IS NOT TO BE CONSIDERED ON THE QUESTION OF WHAT SENTENCE SHOULD BE IMPOSED.

IN DETERMINING THE SENTENCE HE SHOULD RECEIVE, YOU MAY CONSIDER THE EVIDENCE OF THE VICTIM'S PERSONAL CHARACTERISTICS, AND THE EMOTIONAL IMPACT OF THE MURDER ON [1926] THE VICTIM'S FAMILY.

IN CONSIDERING SUCH EVIDENCE, YOU MAY CONSIDER THE VICTIM'S UNIQUENESS AS AN INDIVIDUAL HUMAN BEING.

IN DETERMINING THE DEFENDANT'S, MR. SHAFER'S MORAL CULPABILITY AND BLAMEWORTHINESS, YOU MAY CONSIDER THE SPECIFIC

HARM CAUSED BY THE MURDER, THE CONSEQUENCES OF HIS CRIMINAL ACT, THE IMPACT OF THE MURDER UPON THE VICTIM'S FAMILY, THE PERSONAL CHARACTERISTICS OF THE VICTIM. YOU MAY CONSIDER THE UNIQUE LOSS TO THE VICTIM'S FAMILY CAUSED BY MR. BROOME'S DEATH. YOU MAY CONSIDER THE HUMAN COST OF THE CRIME COMMITTED BY MR. SHAFER.

IN DECIDING WHETHER TO SENTENCE THE DEFENDANT TO DEATH OR LIFE IMPRISONMENT, I REMIND YOU THAT DEATH MEANS JUST WHAT IT SAYS, DEATH. LIFE IMPRISONMENT MEANS INCARCERATION OF THE DEFENDANT UNTIL HIS DEATH.

IT IS NOT NECESSARY THAT ALL OF YOU UNANIMOUSLY AGREE ON THE EXISTENCE OF ANY MITIGATING FACTOR BEFORE YOU AS A JURY MAY CONSIDER IT. THE EXISTENCE OF MITIGATING CIRCUMSTANCES AND THE WEIGHT TO BE ACCORDED TO ANY ARE MATTERS WHICH EACH JUROR MAY DETERMINE FOR HIMSELF.

IT IS NOT NECESSARY FOR THE EXISTENCE OF ANY MITIGATING CIRCUMSTANCE TO BE PROVEN BEYOND A REASONABLE DOUBT, AS I HAVE TOLD YOU. THE DEFENDANT DOES NOT BEAR THAT BURDEN, AND HE NEED NOT PROVE SUCH EXISTENCE OF A MITIGATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

[1927] YOU ARE TO CONSIDER EACH AND EVERY MITIGATING CIRCUMSTANCE YOU FIND TO BE SUPPORTED BY THE EVIDENCE BEFORE YOU IN MAKING YOUR DETERMINATION.

YOU MUST CONSIDER MITIGATING CIRCUMSTANCES BECAUSE IF YOU ARE TO MAKE AN INDIVIDUALIZED ASSESSMENT OF THE APPROPRIATENESS OF THE DEATH PENALTY IN THIS CASE AS THE LAW REQUIRES YOU TO DO, EVIDENCE ABOUT THE DEFENDANT'S BACKGROUND AND CHARACTER ARE VERY RELEVANT.

MITIGATING CIRCUMSTANCES DO NOT NEED JUSTIFICATION, AS I HAVE TOLD YOU. RATHER, MITIGATING CIRCUMSTANCES ARE CIRCUMSTANCES WHICH WEIGH IN FAVOR OF IMPOSING THE LIFE SENTENCE UPON THE DEFENDANT AS OPPOSED TO THE PENALTY OF DEATH.

NOW, BEFORE YOU RECOMMEND THE IMPOSITION OF A LIFE SENTENCE, IT IS NOT NECESSARY THAT YOU FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE ALLEGED STATUTORY MITIGATING CIRCUMSTANCES OR ANY OTHER RELEVANT MITIGATING CIRCUMSTANCE. WHILE IT IS NECESSARY FOR YOU TO FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE BEFORE YOU COULD RECOMMEND THE SENTENCE OF DEATH.

IT IS NOT REQUIRED THAT YOU FIND THE EXISTENCE OF AT LEAST ONE ALLEGED MITIGATING CIRCUMSTANCE IN ORDER TO RECOMMEND THAT HE, MR. SHAFER, RECEIVE A SENTENCE OF LIFE IMPRISONMENT, IRRESPECTIVE OF WHETHER YOU FIND THE EVIDENCE [1928] OF ANY ALLEGED MITIGATING CIRCUMSTANCE.

EVEN IF YOU DO NOT FIND THE EXISTENCE OF A MITIGATING CIRCUMSTANCE, YOU ARE STILL PERMITTED TO SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT. YOU DO NOT HAVE TO FIND A MITIGATING CIRCUMSTANCE EXISTS BEFORE YOU CAN SENTENCE MR. SHAFER TO LIFE IMPRISONMENT.

AS I TOLD YOU EARLIER, YOU MAY SENTENCE HIM TO LIFE IMPRISONMENT FOR ANY REASON OR FOR NO REASON AT ALL. THE LAW OF OUR STATE PERMITS YOU TO SENTENCE HIM TO LIFE BECAUSE OF THE EXISTENCE OF A MITIGATING CIRCUMSTANCE OR PURELY AND SOLELY, AS I SAID, AS AN ACT OF MERCY.

THE STATUTORY INSTRUCTIONS I HAVE IN MY HAND I AM GOING TO GO OVER WITH YOU BRIEFLY, AND THEN I'M GOING TO GO OVER TWO OTHER SENTENCE MATTERS WE HAVE.

PART ONE OF THE STATUTORY INSTRUCTIONS SAYS IN DETERMINING WHETHER THE DEFENDANT, WESLEY AARON SHAFER, BE SENTENCED TO LIFE IN PRISON OR DEATH, YOU SHOULD FIRST DETERMINE WHETHER THE STATE HAS PROVEN THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT. THAT STATUTORY AGGRAVATING CIRCUMSTANCE IS THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ATTEMPTED ROBBERY WHILE ARMED WITH A DEADLY WEAPON.

IF YOU DO NOT UNANIMOUSLY FIND THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE LISTED, YOU SHOULD SO

INDICATE ON PART 1-A OF THE JURY VERDICT FORM ON [1929] AGGRAVATING CIRCUMSTANCE. PART A SAYS "WE THE JURY IN THE ABOVE ENTITLED CASE DO NOT UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF ANY STATUTORY AGGRAVATING CIRCUMSTANCE". IF YOU FIND THAT UNANIMOUSLY, THAT WOULD ONLY BE SIGNED BY THE FOREMAN.

IF, HOWEVER, THE STATUTORY INSTRUCTIONS TELL YOU THIS, YOU FIND THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE AS INDICATED ABOVE, YOU SHOULD SO INDICATE ON PART 1-B OF THE SENTENCING SHEET. YOU'LL SEE ALL THE LINES BELOW THAT. IF THIS FINDING IS UNANIMOUSLY MADE BY YOU, ALL 12 OF YOU, ALL 12 JURORS MUST SIGN INDICATING THAT YOU HAVE UNANIMOUSLY FOUND THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE.

IF YOU DO SO, AND THE INSTRUCTIONS TELL YOU THIS, THEN YOU CONTINUE YOUR DELIBERATIONS IN ORDER TO DETERMINE WHETHER YOU SHALL RECOMMEND THE DEFENDANT, WESLEY AARON SHAFER, BE SENTENCED TO LIFE IMPRISONMENT OR TO DEATH.

IN DETERMINING WHETHER TO RECOMMEND THAT MR. SHAFER BE SENTENCED TO LIFE IMPRISONMENT OR TO DEATH, YOU MAY CONSIDER THE STATUTORY AGGRAVATING CIRCUMSTANCE FOUND BY YOU BEYOND A REASONABLE DOUBT,

AND YOU MAY ALSO CONSIDER ANY OF THE FOLLOWING MITIGATING CIRCUMSTANCES WHICH WILL BE IN THERE WITH YOU:

THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF A PRIOR CRIMINAL HISTORY INVOLVING THE USE OF VIOLENCE AGAINST [1930] ANOTHER PERSON;

TWO, THAT THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTRESS;

THREE, THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT WITH THE REQUIREMENT OF THE LAW WAS SUBSTANTIALLY IMPAIRED;

FOUR, THE AGE AND MENTALITY OF THE DEFENDANT AT THE TIME OF THE CRIME.

FURTHER, YOU MAY CONSIDER ANY OTHER MITIGATING CIRCUMSTANCES WHICH YOU FIND ARE SUPPORTED BY THE EVIDENCE IN THE CASE.

WHEN YOU HAVE DETERMINED THE SENTENCE TO BE IMPOSED UPON THE DEFENDANT, YOU WILL INDICATE THAT ON PART TWO OF THE JURY'S DETERMINATION OF THE SENTENCE TO BE IMPOSED.

IF YOUR UNANIMOUS VERDICT IS TO RECOMMEND THAT THE DEFENDANT SHOULD BE SENTENCED TO LIFE IN PRISON, YOU WOULD INDICATE THIS ON THE FORM BY COMPLETING "A" WHICH SAYS THAT "WE, THE JURY IN THE ABOVE ENTITLED

CASE, UNANIMOUSLY RECOMMEND THAT THE DEFENDANT, WESLEY AARON SHAFER, BE IMPRISONED IN THE STATE PENITENTIARY FOR THE BALANCE OF HIS NATURAL LIFE". AND YOU ALONE WOULD SIGN THAT, MR. FOREMAN.

IF THE UNANIMOUS VERDICT OF THE JURY IS A RECOMMENDATION THAT MR. WESLEY AARON SHAFER SHOULD BE [1931] SENTENCED TO DEATH, THIS WOULD BE INDICATED BY THE COMPLETION OF SECTION B OF PART TWO, AND EACH MEMBER OF THE JURY SHALL INDICATE THEIR AGREEMENT WITH THE VERDICT BY SIGNING SAME.

WHATEVER YOUR RECOMMENDATION, WHATEVER YOUR FINDINGS ARE THEY MUST BE UNANIMOUS; THAT IS, IT MUST BE THE VERDICT OF EACH AND EVERY ONE OF ALL TWELVE OF YOU.

IN CONSIDERING WHETHER TO RECOMMEND A SENTENCE OF DEATH OR LIFE IMPRISONMENT, YOU MUST DECIDE THE ISSUE INVOLVED WITHOUT BIAS, WITHOUT PREJUDICE, AND NOT BASED IN ANY ARBITRARY MANNER.

THE STATE AND THE DEFENDANT HAVE A RIGHT TO EXPECT THAT YOU WILL CAREFULLY, AND IMPARTIALLY CONSIDER ALL OF THE EVIDENCE IN THE CASE, AND THAT YOU WILL FOLLOW THE LAW AS I HAVE CHARGED IT TO YOU.

THROUGHOUT THIS CHARGE I HAVE USED THE TERM RECOMMEND A SENTENCE OF LIFE OR RECOMMEND A SENTENCE OF DEATH. PLEASE BE

ADVISED THAT WHILE I HAVE USED THE TERM RECOMMEND, THE SENTENCE OF THE COURT WILL BE WHAT YOU RECOMMEND. I USE THE WORD RECOMMEND SIMPLY BECAUSE OUR STATUTE REQUIRES THAT. BUT I AM TELLING YOU NOW THAT THE SENTENCE YOU SEND TO ME BY WAY OF A RECOMMENDATION WILL IN FACT BE THE SENTENCE THAT THE COURT IMPOSES ON THE DEFENDANT.

NOW, LIKE BEFORE, I HAVE TO GO OVER THIS PART OF MY CHARGE WITH THE ATTORNEYS AND MAKE SURE I HAVE MADE NO ERRORS. IF I HAVE, I WILL BRING YOU BACK IN. IF NOT, I WILL [1932] SEND IN TO YOU THE STATUTORY INSTRUCTIONS, AND PART ONE AND PART TWO FOR YOU TO GO OVER.

I ASK THAT YOU NOT START DELIBERATING UNTIL YOU HEAR FROM ME BECAUSE I HAVE TO MAKE SURE MY INSTRUCTIONS ARE COMPLETE AND ACCURATE.

I DON'T HAVE A WRITTEN CHARGE, ALTHOUGH I DO HAVE WRITTEN INSTRUCTIONS THAT YOU WILL HAVE WITH YOU. BUT IF YOU WISH ME TO GO OVER ANY PRINCIPLES OF LAW, PLEASE LET ME KNOW, AND I WILL BRING YOU BACK OUT AND INSTRUCT YOU.

IF YOU WISH TO LISTEN TO ANY TESTIMONY, LET ME KNOW THAT, AND I WILL BRING YOU BACK OUT AND WE WILL FIND THE TESTIMONY THAT YOU WISH.

IF AT ANY TIME YOU NEED, MR. FOREMAN, TO MAKE SOME KIND OF REPORT TO ME, I'M NOT SUGGESTING THAT YOU MAKE A REPORT, BUT IF YOU FEEL YOU NEED TO COMMUNICATE WITH ME ABOUT ANYTHING GOING ON IN THE JURY ROOM, DO NOT SET FORTH ON ANY NOTE ON HOW THE JURY STANDS REGARDING ANY ISSUE; IF YOU HAVE ANY QUESTIONS, SIMPLY SEND OUT THE QUESTION.

MR. SIMS AND MS. MURPHY, YOU WILL BE SEATED WHERE YOU WERE BEFORE, AND WILL NOT PARTICIPATE IN THE DELIBERATIONS.

I HAVE ORDERED LUNCH FOR YOU AROUND 2:00 O'CLOCK. IF YOU WISH TO STOP FOR LUNCH AND EAT, YOU CAN; IF YOU WISH TO WORK THROUGH LUNCH, YOU CAN. IF YOU NEED A BREAK, LET ME KNOW. YOU ARE ALL ON BREAK, OR YOU ARE ALL AT WORK.

[1933] WHEN YOU REACH A VERDICT OR IF YOU HAVE A QUESTION, JUST KNOCK ON THE DOOR. A BAILIFF WILL BE STATIONED OUT THERE, AND THEY WILL COME GET US AS SOON AS POSSIBLE.

I'M GOING TO LET YOU GO TO THE JURY ROOM, BUT DON'T START YOUR DELIBERATIONS AT THIS POINT.

IN CAMERA:

THE COURT: ANY EXCEPTIONS BY THE STATE?

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I CALL THE COURT'S ATTENTION TO

THE DOCUMENTATION YOU HAVE GIVEN US, PARTICULARLY PAGE 2240, AND IT REFERS TO – THE COURT'S INSTRUCTIONS SAYS [sic] "IN REACHING YOUR DECISION AS TO WHICH SENTENCE TO RECOMMEND, YOU WILL CONSIDER THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. WHILE AN AGGRAVATING CIRCUMSTANCE MUST BE FOUND BEFORE YOU COULD EVEN CONSIDER RECOMMENDING THE DEATH PENALTY, ONCE SUCH FINDING IS MADE BEYOND A REASONABLE DOUBT", THE PARAGRAPH SAYS "EVEN THOUGH YOU FIND THE EXISTENCE OF MITIGATING CIRCUMSTANCES", THE COURT BEGAN INTO THAT AND SAID RECOMMEND A LIFE SENTENCE. I DON'T THINK YOU REALIZED YOU SAID MITIGATING CIRCUMSTANCE.

YOUR HONOR, I WOULD REQUEST THAT THAT BE INSTRUCTED TO THEM. I DON'T THINK IT WAS CORRECTLY GIVEN TO THEM ORIGINALLY.

THE COURT: ALL RIGHT NOW, TELL ME WHAT I CHARGED, AND TELL ME WHAT YOU SAY I SHOULD HAVE CHARGED.

MR. POPE: YOUR HONOR, ON 2240.

[1934] **THE COURT:** I'M THERE.

MR. POPE: THE BEST I HEARD, YOU SEE THE PARAGRAPH STARTING AT LINE 15.

MR. POPE: ALL RIGHT, I'M WITH YOU.

MR. POPE: I THINK YOU BEGAN THROUGH THAT PARAGRAPH AND GOT TO RECOMMEND THE SENTENCE, AND ACTUALLY I THINK THAT WAS TALKING ABOUT THE DEATH SENTENCE, YOU SAID

A LIFE SENTENCE THERE, AND THEN YOU SAID EVEN THOUGH, AND IT APPEARED AS IF, AND OF COURSE I CAN'T JUDGE WHAT YOU WERE THINKING, BUT IT APPEARS THAT YOU SAW STATUTORY MITIGATING CIRCUMSTANCES, AND KIND OF WENT ON TO ANOTHER THING, AND DIDN'T FINISH. AND I WOULD REQUEST THAT IN ITS ENTIRETY, YOUR HONOR.

THE COURT: WELL, THE QUESTION IS DID I NOT COVER THAT IN THE TOTALITY OF THE CHARGE?

MR. POPE: I DON'T THINK SO, YOUR HONOR.

THE COURT: I THINK I TOLD THEM THAT WHILE AN AGGRAVATING CIRCUMSTANCE MUST BE FOUND BEFORF YOU CAN CONSIDER RECOMMENDING THE DEATH PENALTY, AND I THINK I DID TELL THEM THAT THEY COULD RECOMMEND THAT SENTENCE EVEN THOUGH THEY FOUND THE EXISTENCE OF A STATUTORY MITIGATING CIRCUMSTANCE.

I REMEMBER GETTING A LITTLE CONFUSED ABOUT MY LANGUAGE, AND GETTING OFF TRACK, BUT I THINK I CHARGED THAT. ANYTHING ELSE?

[1935] **MR. POPE:** YOUR HONOR, I WOULD NOTE OUR OBJECTION. IT APPEARS THAT YOU DID NOT INDICATE IN THE BODY THAT THEY HAD TO SIGN THE VERDICT FORM. BUT I DO KNOW THAT YOU GAVE THEM A VERDICT FORM THAT REQUIRES

ALL 12 OF THEM TO SIGN AS FAR AS THE DEATH PENALTY.

WE OBJECTED IN CHAMBERS THAT WE WERE NOT ALLOWED TO CROSS EXAMINE THE JURORS ON SIGNING A FORM, AND I JUST NOTE THE STATE'S OBJECTION TO THAT.

THE ONLY OTHER ITEM I SEE, MR. BRACKETT IS LOOKING AND SAID Y'ALL DISCUSSED IN CHAMBERS THAT YOU WOULD INDICATE LETHAL INJECTION. I THOUGHT YOU SAID ELECTROCUTION.

THE COURT: I DIDN'T MEAN TO SAY EITHER ONE. I THINK I JUST SAID DEATH BECAUSE I DECIDED NOT TO USE EITHER ONE, SO I JUST SAID DEATH.

MR. POPE: YOU DID IN FACT SAY DEATH BY ELECTROCUTION,

MR. BRACKETT: YOU JUST READ THEM RIGHT OFF THE STATUTE. THE STATUTE IS 24-3-530.

THE COURT: I QUITE CANDIDLY CAN'T RECALL MAKING THAT STATEMENT. IF YOU WILL TELL ME WHERE IT IS, WE'LL GO BACK AND FIND IT. BECAUSE THE ONLY PLACE THAT I EVEN HAVE THAT WRITTEN DOWN, I CONSCIENTIOUSLY LEFT OFF AFTER THE WORD DEATH.

MR. POPE: YOUR HONOR, IT WOULD BE ON THE SECOND PAGE, AGAIN, OF THE DOCUMENT THAT YOU GAVE US. YOU SAID, ONE [1936] IS THE DEATH PENALTY WHICH IN THIS STATE IS BY ELECTROCUTION.

THE COURT: I'VE GOT ELECTROCUTION MARKED OUT ON MINE. I FEEL CONFIDENT THAT I DIDN'T SAY IT.

MR. BRACKETT: IT'S ON PAGE 2238. I HAVE IT MARKED ON MY PAGE BECAUSE I TOOK A NOTE WHEN YOU SAID IT. IT'S LINE 9, THE DEFENDANT SHALL BE SENTENCED TO LIFE IMPRISONMENT RATHER THAN DEATH BY ELECTROCUTION.

THE COURT: LET'S GO BACK AND FIND IT, AND SEE IF I SAID THAT BECAUSE IF I DID, I'LL CORRECT IT. DOES THE DEFENSE RECALL WHETHER I SAID IT OR NOT?

MR. BANKS: YOU SAID IT.

THE COURT: OKAY, ALL RIGHT, THANK YOU.

MR. BANKS: I THINK IT'S A MOOT POINT. I MEAN I DON'T THINK IT'S NECESSARY –

MR. BRACKETT: IT'S NOT THE LAW, YOUR HONOR. I DON'T THINK THEY SHOULD BE TOLD THAT IT'S DEATH BY ELECTROCUTION BECAUSE THE STATUTE READS OR AT THE ELECTION OF THE PERSON, LETHAL INJECTION, IT'S AT THEIR OPTION.

THE COURT: ALL RIGHT, SO THE STATUTE HAS NOW CHANGED, BUT AT THIS TIME IT WAS DEATH BY ELECTROCUTION OR LETHAL INJECTION?

MR. BRACKETT: YES, SIR. AT THAT TIME IT WAS THE OPTION OF THE DEFENDANT, AND THAT

IS THE CURRENT LAW. WHAT I CITED TO THE COURT IS SECTION B OF THAT STATUTE.

THE COURT: WHAT WAS THE LAW ON APRIL 13TH, 1997?

[1937] **MR. BRACKETT:** IT WAS AT HIS OPTION.

THE COURT: OKAY, YOU'RE ON RECORD. I'M NOT GOING TO BRING THEM BACK IN AND RECHARGE THEM.

MR. BANKS: OUR ONLY OBJECTION IS OUR PREVIOUS OBJECTION TO THE STATUTORY LANGUAGE NOT BEING CHARGED –

MR. NETTLES: I HAVE TO, JEFF BLUME IS MY BOSS, I WOULD JUST LIKE TO RENEW OUR OBJECTION AS TO THE STATUTORY AGGRAVATOR OF ARMED ROBBERY. THAT'S ALL.

THE COURT: ALL RIGHT. LET ME TELL YOU WHY I'M NOT GOING TO BRING THEM BACK FOR THAT. THE ISSUE IS LIFE OR DEATH. I PROBABLY SHOULDN'T HAVE SAID EITHER ONE, I DIDN'T MEAN TO, QUITE CANDIDLY, BECAUSE I STRUCK IT OUT IN ONE PLACE. WHAT PREJUDICE IS THERE TO THE STATE IN NOT GOING OVER THE CHOICES?

MR. POPE: WE WITHDRAW IT, YOUR HONOR.

THE COURT: ALL RIGHT. CHECK THE STATUTORY INSTRUCTIONS; CHECK PART ONE AND PART TWO. CHECK THE EXHIBITS; SEND THEM IN, AND

TELL THEM TO START DELIBERATING WHEN THESE GO IN.

MR. NETTLES: OBVIOUSLY, MY MOTION IS DENIED?

THE COURT: ALL MOTIONS ARE DENIED. (THE JURY BEGAN THEIR DELIBERATION AT 1:35 P.M.. THE COURT RECEIVED A QUESTION FROM THE JURY AT 5:10 P.M.)

THE COURT: WE HAVE RECEIVED TWO QUESTIONS FROM THE JURY. THE FIRST STATES, QUOTE, IS THERE ANY REMOTE CHANCE [1938] FOR SOMEONE CONVICTED OF MURDER TO BECOME ELIGIBLE FOR PAROLE, END QUOTE. THE SECOND ONE IS, QUOTE, UNDER WHAT CONDITIONS WOULD SOMEONE CONVICTED FOR MURDER BE ELIGIBLE, END QUOTE. IT DOESN'T SAY ELIGIBLE FOR PAROLE, BUT I ASSUME THAT'S WHAT THEY ARE TALKING ABOUT. I'LL BE GLAD TO HEAR FROM THE STATE.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I CALL THE COURT'S ATTENTION TO STATE V. KEITH SIMPSON, 479 SOUTHEAST 2D, 57, 1996 CASE; THE STATE VERSUS JASON SCOTT BYRUM, 485 SOUTHEAST 2D 360. I ALSO CALL THE COURT'S ATTENTION BACK TO STATE VERSUS ROBERT SUTHERLAND, 447 SOUTHEAST 2D, 1994. IN PARTICULAR OF INTEREST, I CALL THE COURT'S ATTENTION TO SUTHERLAND, WE FELT IT WAS UNDER THE OLD STATUTE, SUTHERLAND WAS PAROLE INELIGIBLE AND IN THE SUTHERLAND CASE IT GOES RIGHT TO THE TWO PRONGS OF SIMMONS.

AS THE COURT IS AWARE, THE TWO PRONGS OF SIMMONS ARE WHETHER THE STATE LAW PROHIBITS THE DEFENDANT FROM BEING PAROLE ELIGIBLE, AND WHETHER OR NOT THE STATE ARGUES FUTURE DANGEROUSNESS.

YOUR HONOR, I WOULD ARGUE TO BEGIN WITH CLEARLY THE JUDGE HAS RULED THAT FUTURE DANGEROUSNESS HAS NOT BEEN ARGUED AS AN ISSUE. WITH THAT BEING THE CASE, AND THE SECOND PRONG OF SIMMONS HAS NOT BEEN MET, THEREFORE, THE JURY SHOULD NOT BE INFORMED AS TO ANY PAROLE ELIGIBILITY.

IN PARTICULAR, YOUR HONOR, I WOULD CALL THE COURT'S [1939] ATTENTION IN SUTHERLAND, IT SAYS SUTHERLAND CONTENDS THAT THE TRIAL JUDGE VIOLATED BOTH DUE PROCESS AND EIGHTH AMENDMENT BY REFUSING TO INSTRUCT THE JURY THAT HE WOULD BE INELIGIBLE FOR PAROLE. WE DISAGREE. WHEN THE STATE PUTS THE DEFENDANT'S FUTURE DANGEROUSNESS IN ISSUE THE STATE LAW PROHIBITS THE DEFENDANT'S RELEASE, DUE PROCESS REQUIRES THAT HE BE ALLOWED TO BRING PAROLE INELIGIBILITY TO THE JURY'S ATTENTION BY WAY OF ARGUMENT, AND INSTRUCTION. THAT WAS SIMMONS.

HERE IT WAS NOT ARGUED, THEREFORE, FUTURE DANGEROUSNESS IS NOT AN ISSUE. YOUR HONOR, I WOULD SUBMIT THAT THE PROPER CHARGE WOULD BE THE NORRIS CHARGE. WHEN THE ISSUE IS RAISED, THE COURT SHOULD INSTRUCT THE JURY THAT IT SHALL NOT CONSIDER

PAROLE ELIGIBILITY IN REACHING ITS DECISION, AND THAT THE TERM LIFE IMPRISONMENT AND A DEATH SENTENCE SHOULD BE UNDERSTOOD IN THEIR ORDINARY AND PLAIN MEANING. MY ARGUMENT IS THAT'S WHAT IT OUGHT TO BE BASED ON THE JUDGE'S INSTRUCTIONS THAT A LIFE SENTENCE MEANS – I THINKS IT'S LANGUAGE TO THE EFFECT OF UNTIL THE DEATH OF THE OFFENDER.

THE STATE WOULD HAVE NO OBJECTION TO YOU SUBSTITUTING THAT LANGUAGE IN WITH THE ISSUE THAT PAROLE ELIGIBILITY IS NOT A FACTOR; THE CASE LAW IS CLEAR ON THAT, YOUR HONOR. AND THAT IS WHAT WE WOULD REQUEST.

MR. BANKS: YOUR HONOR, WE WOULD ARGUE, OBVIOUSLY, IN THE ALTERNATIVE. WE WOULD ACCEPT THAT THE BASELINE FOR [1940] THIS ARGUMENT IS LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER, WHICH HAS ALREADY BEEN CHARGED. SO, THAT IS THE BASELINE.

WE WOULD ALSO STIPULATE, I THINK THE STATE WOULD AGREE, THE SECOND QUESTION CAN'T BE ANSWERED IN EITHER CASE. SO, WHAT WE'RE LEFT WITH IS THE FIRST QUESTION AND WE WOULD ARGUE SEVERAL THINGS. ONE, THAT THE SIMMONS 1994 CASE WAS PREVIOUS TO THE CHANGES IN THE STATUTE. THE STATUTE WAS SUBSTANTIALLY RE-WRITTEN IN 1995 AND WENT INTO EFFECT ON JANUARY 1, 1996. IT WAS REVISED AGAIN IN 1996, AND WENT INTO EFFECT ON MAY 20TH, 1996. THE 1997 STATUTE HAS REMAINED THE

SAME. THE STATUTE IN EFFECT AT THE TIME OF THE COMMISSION OF THIS CRIME WAS 16-3-20 AND IT ANSWERS THE QUESTION.

AND PREVIOUS TO THE CHANGE IN THE STATUTE, IF THE STATE CHOSE TO SHOW FUTURE DANGEROUSNESS, THEN IT TRIGGERED WHETHER YOU'VE GOT PLAIN AND ORDINARY MEANING OR NOT. SINCE THEN, THE TRIGGER IS NOT FUTURE DANGEROUSNESS, BUT RATHER THERE WAS AN AGGRAVATOR. THE SIMMONS' PRONGS ARE – THAT IF YOU MEET THE FIRST PRONG, THAT WHETHER OR NOT THERE IS PAROLE ELIGIBILITY, THEN YOU HAD TO LOOK FOR THE SECOND PRONG TO SEE WHETHER YOU CHARGED IT OR NOT.

IF YOU HAVE THE FIRST PRONG WHERE THERE IS NO PAROLE ELIGIBILITY, THERE IS NO NEED TO EVEN GET TO THE SECOND. IF THEY FIND AN AGGRAVATOR, WHICH IS THE TRIGGER UNDER THE CURRENT STATUTE, HE IS NOT ELIGIBLE FOR PAROLE. [1941] THE LEGISLATURE HAS MADE THAT CLEAR. NO PERSON SENTENCED TO LIFE IMPRISONMENT PURSUANT TO THIS SECTION IS ELIGIBLE FOR PAROLE, COMMUNITY SUPERVISION, ANY EARLY RELEASE PROGRAM, NOR IS THE PERSON ELIGIBLE TO RECEIVE ANY WORK CREDITS, EDUCATION CREDIT, GOOD CONDUCT CREDIT OR ANY OTHER CREDITS THAT WOULD REDUCE THE MANDATORY LIFE IMPRISONMENT THAT IS REQUIRED BY THIS SECTION.

BECAUSE THERE IS NO PAROLE ELIGIBILITY POSSIBLE IF THEY FIND AN AGGRAVATOR, THE ISSUE OF FUTURE DANGEROUSNESS IS TOTALLY MOOT.

SECOND, THE STATUTE HAS BEEN CHARGED BY THE NUMBER, AND I THINK ONCE A STATUTE IS CHARGED BY THE NUMBER, ANYTHING RELEVANT THEREUNDER SHOULD BE CHARGED. THE COURT HAS PICKED LANGUAGE IN THE MIDDLE OF THAT PARAGRAPH ABOUT LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE OFFENDER. THE REMAINDER OF IT IS NOTHING MORE THAN AN EXPLANATION THAT LIFE MEANS UNTIL DEATH. IT DOESN'T ADD ANYTHING TO IT EXCEPT TO EXPLAIN THE LANGUAGE THE COURT HAS ALREADY GIVEN. AND IF THE COURT SAYS I'M GOING TO CHARGE 16-3-20, AND SAYS LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER, AND THE JURY SAYS PLEASE EXPLAIN THAT, THE LEGISLATURE HAS EXPLAINED IT. THEY HAVE EXPLAINED EXACTLY WHAT IT MEANS. WE WOULD ASK THE COURT TO READ 16-3-20 BEGINNING AT "IF THE STATE SEEKS THE DEATH PENALTY" ON THE THIRD LINE, AND ENDING "LIFE IMPRISONMENT REQUIRED BY THIS SECTION", WHICH IS ON ABOUT THE [1942] TENTH OR ELEVENTH LINE.

THE COURT: MR. POPE?

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I WOULD SUBMIT THAT CLEARLY THAT READING THE STATUTE IS NO DIFFERENT THAN IN THE PAST WHEN THEY HAD 20 YEARS AND

30 YEARS, AND CLEARLY THERE ARE NUMEROUS TIMES WHEN THE COURT WOULD READ THE PERTINENT PART OF THE STATUTE TO GO BEFORE THE JURY WITHOUT READING THE ENTIRE STATUTE. I DON'T THINK THE FACT THAT YOU CITE A STATUTE REQUIRES YOU TO READ –

THE COURT: I'M NOT GOING TO CHARGE THE WHOLE STATUTE, I CAN TELL YOU THAT NOW. LET ME INTERJECT. ARE THERE ANY CASES REGARDING THIS MATTER SINCE THE LANGUAGE WAS CHANGED TO NO PAROLE?

MR. POPE: THE NEWEST CASE I HAVE, YOUR HONOR, IS BYRUM. BUT, AGAIN, BYRUM APPEARS TO BE ELIGIBLE. IT WAS DECIDED DURING THIS TIME, AND IT APPEARS THAT BYRUM WOULD COME UNDER THE PRIOR LAW; IT APPEARS THAT HE WOULD BE ELIGIBLE.

HOWEVER, AGAIN, I WOULD CALL THE COURT'S ATTENTION TO SUTHERLAND IN WHICH THE WHOLE ISSUE IS SOMEBODY BEING INELIGIBLE, AND SUTHERLAND WAS INELIGIBLE, BUT FUTURE DANGEROUSNESS WAS NOT ARGUED, AND IT WAS HELD THAT THERE IS NO REQUIREMENT –

THE COURT: LET ME SEE SUTHERLAND.

(AFTER A PAUSE.)

[1943] THE COURT: TELL ME ABOUT THIS LAST PART HERE, ALTHOUGH THEY START OFF BY SAYING "MOREOVER", ACTING JUSTICE RUSHING. "FUTURE DANGEROUSNESS IS NOT AT ISSUE; MOREOVER, DEFENSE COUNSEL INFORMED THE JURY

THROUGHOUT CLOSING ARGUMENT THAT LIFE IMPRISONMENT FOR SUTHERLAND MEANT THAT HE WOULD NEVER BE RELEASED FROM PRISON"?

MR. POPE: AND I THINK THAT'S WHAT WE'VE GOT HERE, YOUR HONOR.

THE COURT: "ADDITIONALLY, BECAUSE DEFENSE COUNSEL INFORMED THE JURY OF SUTHERLAND'S PAROLE INELIGIBILITY", I DON'T KNOW WHETHER HE DID THAT DIRECTLY OR BY IMPLICATION, "WE FIND HIS EIGHTH AMENDMENT ARGUMENT MERITLESS."

BUT BEFORE THEY GOT THERE, IN THIS CASE – HOW DO YOU DISTINGUISH SUTHERLAND? SUTHERLAND WAS NOT ELIGIBLE FOR PAROLE, FOR A DIFFERENT REASON, GRANTED.

MR. BANKS: WHAT WAS THE QUESTION, JUDGE?

THE COURT: HOW DO YOU DISTINGUISH SUTHERLAND? SUTHERLAND WAS INELIGIBLE FOR PAROLE, A SECOND VIOLENT CRIME.

MR. BANKS: YES, SIR.

THE COURT: SO, UNDER THE VIOLENT CRIMES, HE WAS INELIGIBLE.

MR. BANKS: TWO THINGS, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BANKS: THE FIRST IS THE STATUTE THAT SAYS HE WAS INELIGIBLE DOES NOT CONTAIN THE SAME LANGUAGE AS THIS ONE [1944] DOES.

THE STATUTE IS IN HERE SOMEWHERE. HERE IT IS. "NO PERSON SENTENCED UNDER THE PROVISIONS OF THIS SUB-SECTION MAY RECEIVE ANY WORK RELEASE CREDITS, GOOD TIME CREDITS OR ANY OTHER CREDITS THAT WOULD REDUCE THE MANDATORY IMPRISONMENT REQUIRED BY THIS SUB-SECTION".

THE STATUTE UNDER SUTHERLAND THAT SAYS PAROLE ELIGIBILITY, DOESN'T SAY NO PAROLE, DOESN'T SAY DEATH. SO, THE DIFFERENCE IS THE MOST THAT SUTHERLAND COULD GET IS LESS THAN THE MOST THAT MR. SHAFER COULD GET UNDER THIS STATUTE. SO, THAT'S THE FIRST DIFFERENCE.

THE OTHER DIFFERENCE IS WE HAVE NOT ARGUED PAROLE INELIGIBILITY BECAUSE WE DIDN'T GET THE CHARGE; WHAT WE HAVE ARGUED IS DEATH. IN SUTHERLAND IT INDICATES THEY ARGUED PAROLE INELIGIBILITY, AND WE HAVEN'T DONE THAT.

THE COURT: BASED ON THE RATIONALE OF SUTHERLAND, THE VAST LINE OF CASES, EVEN THOUGH THEY DEALT TO SOME DEGREE DIFFERING LANGUAGES ON DIFFERENT OCCASIONS, I AM NOT GOING TO CHARGE THE JURY ABOUT PAROLE INELIGIBILITY. I AM SIMPLY GOING TO CHARGE AGAIN THAT LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER.

MR. BANKS: I WOULD NOTE OUR OBJECTION; YOUR HONOR.

THE COURT: CERTAINLY.

MR. BANKS: OUR POSITION IS THAT WESLEY SHAFER IS NOT ELIGIBLE FOR PAROLE; IN SUTHERLAND, HE WAS.

THE COURT: WELL, IN SUTHERLAND THEY WEREN'T.

[1945] **MR. BANKS:** YES, SIR.

THE COURT: I MEAN, LET'S GO BACK AND LOOK AT IT BECAUSE I DON'T WANT TO BE GOING OFF ON SOMETHING I MISUNDERSTAND.

MR. BANKS: UNDER THE SUTHERLAND STATUTE –

THE COURT: I'M NOT LOOKING AT THE SUTHERLAND DEATH PENALTY STATUTE. I'M LOOKING AT THE FACTS AS TO WHETHER OR NOT THE DEFENDANT, ROBERT H. SUTHERLAND, WAS OR WAS NOT ELIGIBLE FOR PAROLE. THIS CASE SAYS HE WAS NOT, FOR A DIFFERENT REASON OTHER THAN WHAT WE ARE TALKING ABOUT TODAY, SO THEY SAID, EVEN IN LIGHT OF THAT, HE WAS NOT ENTITLED TO IT.

MR. BANKS: I UNDERSTAND. IT IS OUR POSITION, WITH ALL DUE RESPECT, THAT UNTIL THE 1995 AND 1996 REVISIONS, EVERYBODY SENTENCED TO LIFE WAS ELIGIBLE FOR PAROLE AFTER SERVING 30 YEARS.

THE COURT: EXCEPT FOR MR. SUTHERLAND.

MR. BANKS: NO, SIR. THE STATUTE SAID THAT HE COULD NOT GET ANY WORK RELEASE CREDITS, GOOD TIME CREDITS, OR ANY OTHER CREDITS THAT WOULD REDUCE THE MANDATORY IMPRISONMENT.

IT IS MY UNDERSTANDING OF THE LEGISLATIVE HISTORY IS THAT YOU HAVE A LIFE 30 AND A LIFE 20, AND THAT YOU HAD TO DO EVERY DAY OF THE 30, AND PAROLE INELIGIBILITY WAS DEFINED AS NO WORK RELEASE CREDITS, ET CETERA. [1946] THE CHANGE IS PAROLE INELIGIBILITY IS NOW DEFINED AS DEATH.

THE COURT: SECTION 24-21-640 AS APPLICABLE TO SUTHERLAND, PROVIDED THE BOARD MUST NOT GRANT PAROLE, NOR IS PAROLE AUTHORIZED FOR ANY PRISONER SERVING A SENTENCE FOR A SECOND OR SUBSEQUENT CONVICTION FOLLOWING A SEPARATE SENTENCING FOR A PRIOR CONVICTION FOR A VIOLENT CRIME AS DEFINED IN SECTION 60.

AGAIN, SUTHERLAND, LIKE MR. SHAFER, IF HE RECEIVED LIFE IMPRISONMENT, WAS NOT ENTITLED TO PAROLE.

MR. BANKS: AND YOU SHOULD GO BACK AND READ 16-3-20(A) AT THAT TIME, IT MEANS THAT THAT 24-21-640 DIDN'T GO INTO EFFECT UNTIL THEY HAD SERVED 30 YEARS. AND THAT'S WHAT THE DEPARTMENT OF CORRECTIONS WAS DOING. THAT'S WHY YOU HAVE A 30 AND A 20. ONCE THEY DID 30 – THEY COULDN'T DO 29, COULDN'T DO 28, BUT ONCE YOU DID 30, THEN THE

ISSUE OF 24-21-640 TRIGGERED. HERE IT DOESN'T. 24-21-640 IS NO LONGER NECESSARY BECAUSE THE EXPLANATION OF PAROLE INELIGIBILITY UNDER THE CURRENT STATUTE IS UNTIL DEATH.

THE COURT: WELL, LEAVING ALL STATUTES OUT, LET'S JUST LOOK AT THE FACTS. HOW IS THE END RESULT AS TO THE INCARCERATION AND POSSIBILITY OF PAROLE DISTINGUISHED FROM SUTHERLAND?

MR. BANKS: IN MY OPINION SUTHERLAND, AFTER 30 YEARS, AFTER DOING EVERY DAY OF 30 YEARS, HE WAS ELIGIBLE [1947] BECAUSE THAT WAS THE SENTENCE. THE PLAIN AND ORDINARY MEANING OF CASES DEALT WITH DEFENSE ATTORNEYS WANTING PEOPLE TO KNOW THAT HE WAS GOING TO HAVE TO DO LIFE. AND THE SOLICITOR'S OFFICE WAS SAYING, NO, WE CAN'T TELL THEM THAT BECAUSE THEY CAN GET OUT IN 30 AND 24-21-640 WAS THERE.

THE PLAIN AND ORDINARY MEANING STACK OF CASES, AND ALL THE CASES THAT USED THAT LANGUAGE WAS BECAUSE THE STATE – I MEAN BECAUSE THE DEFENSE WANTED THEM TO THINK THEY WOULD NEVER GET OUT. AND THE STATE SAID, NO, YOU CAN'T CHARGE THAT BECAUSE THEY ARE ELIGIBLE IN 30. AND THAT'S WHAT THE LAW WAS.

AND THE PLAIN AND ORDINARY MEANING WAS AGAINST THE DEFENSE, AND A BENEFIT TO THE STATE BECAUSE THEY WERE NOT ALLOWED TO BE TOLD IT WOULD BE 30. THE LEGISLATURE, YOU

KNOW, IT'S A BIG HOT TOPIC, IS NO PAROLE, TRUTH IN SENTENCING. SO, THEY HAVE DEFINED UNDER THE NEW MURDER STATUTES THAT NO PAROLE MEANS DEATH; IT MEANS NO WORK CREDITS, IT MEANS NO COMMUNITY SUPERVISION – I MEAN EVERY POSSIBLE OPTION OF THE DEPARTMENT OF CORRECTIONS HAS NOW SAID THAT THAT DOESN'T APPLY.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I THINK THE COURT IS AWARE THAT SUTHERLAND STOOD IN EXACTLY THE SAME STEAD, REGARDLESS OF HOW HE GOT THERE. HE WAS INELIGIBLE, AND THAT'S WHAT THE SUPREME COURT SAYS IN THAT CASE.

[1948] YOUR HONOR, THE COURT HAS ALREADY RULED. MY UNDERSTANDING IS THAT THE COURT WILL INSTRUCT THE JURY THAT THEY SHOULD NOT CONSIDER PAROLE ELIGIBILITY AND WILL GIVE AN INSTRUCTION AS TO WHAT LIFE OR DEATH IS AS GIVEN PREVIOUSLY.

MR. BANKS: AND IT IS MY FINAL POSITION THAT THE STATE KNOWS IN THIS CASE THAT UNDER THE CURRENT LAW THAT IF THEY FOUND AN AGGRAVATING CIRCUMSTANCE, THAT MR. SHAFER WILL DIE IN PRISON. I THINK THE JURY OUGHT TO BE TOLD THAT.

THE COURT: LET ME ASK ONE LAST QUESTION OF THE STATE. THE CASES THAT HAVE APPROVED STATING THEY NEED NOT CONSIDER PAROLE ELIGIBILITY, IS THAT MANDATED BY CASE LAW?

MR. POPE: I'M NOT SURE I UNDERSTAND.

THE COURT: UNDER THE PLAIN AND ORDINARY MEANING.

MR. POPE: YOUR HONOR, GOING ALL THE WAY BACK TO NORRIS, IT SAYS, "WHEN THE ISSUE IS RAISED, THE COURT SHOULD INSTRUCT THE JURY THAT IT SHALL NOT CONSIDER PAROLE ELIGIBILITY IN REACHING ITS DECISION, AND THAT THE TERMS LIFE IMPRISONMENT AND DEATH SENTENCE SHOULD BE UNDERSTOOD IN THEIR PLAIN AND ORDINARY MEANING". YOUR HONOR, THAT IS THE POSITION OF THE STATE. I AM WILLING TO CONCEDE, SINCE THE JUDGE HAS GIVEN THE DEFENSE THAT ADDITIONAL INSTRUCTION, THAT YOU ADD IN THERE AS FAR AS THE DESCRIPTION OF LIFE BASED ON THE STATUTE. BUT, AGAIN, YOUR HONOR, IT SAYS "THE COURT SAYS WHEN THE ISSUE IS RAISED, THE COURT SHOULD INSTRUCT THE JURY THAT IT SHALL NOT CONSIDER" – WHAT YOU ARE GETTING BY THE [1949] NOTE THAT YOU HAVE FROM THE JURY, YOUR HONOR, IS THAT THE JURY IS ASKING FOR GUIDANCE AND INSTRUCTION ON SOMETHING THAT SURELY THE CASE LAW SAYS THEY SHOULD NOT BE THINKING ABOUT AND CONSIDERING. THAT'S WHY OUR SUPREME COURT HAS SAID THAT YOU SHOULD TELL THEM – IF THAT QUESTION COMES UP, AS IT HAS IN THE PAST, THAT YOU SHOULD TELL THEM THAT THEY SHOULD NOT BE CONSIDERING THAT.

MR. BANKS: YOUR HONOR, PRIOR TO – SIMMONS IS POST SULLIVAN; SIMMONS CAME

AFTER SULLIVAN, AND PRIOR TO THIS STATUTE, PRIOR TO 16-3-20(B) CHANGE, THE SOLICITORS IN THE STATE OF SOUTH CAROLINA WOULD SAY I AM GOING TO SERVE NOTICE OF THE DEATH PENALTY IF YOU DON'T PLEAD, AND YOUR GUY NEEDS TO PLEAD BECAUSE HE IS ELIGIBLE IN 30 YEARS. NOW, THEY SAY HE CAN GET LIFE UNTIL DEATH.

JURIES FROM MAY 30TH, 1996 HAVE THREE OPTIONS IN THE STATE OF SOUTH CAROLINA. WE FIND NO AGGRAVATING CIRCUMSTANCES; THEREFORE, YOU GET LIFE. IN WHICH CASE IT IS THE PLAIN AND ORDINARY MEANING. WE FIND AGGRAVATING CIRCUMSTANCES, IN THAT CASE YOU GET LIFE UNTIL YOU DIE IN PRISON WITH NO PAROLE ELIGIBILITY, NO WORK CREDITS. WE FIND AGGRAVATING CIRCUMSTANCES, WE SENTENCE DEATH.

THERE ARE THREE CLEAR OPTIONS. IN THIS CASE IT'S SUPPOSED THAT THERE ARE TWO CLEAR OPTIONS, AND SUTHERLAND AND CASES UNDER PREVIOUS STATUTES ARE INAPPLICABLE IN THIS SITUATION.

[1950] **MR. POPE:** YOUR HONOR, THEY ARE NOT INAPPLICABLE BASED ON WHERE SUTHERLAND STOOD AS FAR AS PAROLE ELIGIBILITY AND AS FAR AS WHAT YOU ARE LOOKING AT.

YOUR HONOR, IT IS CLEAR THAT THE ISSUE, AND WE CAN ARGUE ALL EVENING ABOUT IT, BUT THE ISSUE IS THEY SHOULD NOT CONSIDER PAROLE ELIGIBILITY, AND THAT IS CLEAR, YOUR HONOR.

YOUR HONOR, I WANT TO MAKE IT CLEAR, TOO. MR. BRACKETT PULLED UP SUTHERLAND, YOU HAVE MY COPY, SIMMONS IS QUOTED IN SUTHERLAND, SO IT DID IN FACT COME AFTER.

THE COURT: WELL, I'M GOING TO CHARGE THIS. THIS IS MY RULING. CERTAINLY YOU CAN EXCEPT NOW AND AFTER THE CHARGE. MY RESPONSE, I'M GOING TO CHARGE THEM: YOUR CONSIDERATION IS RESTRICTED TO WHAT SENTENCE TO RECOMMEND. I WILL, AS TRIAL JUDGE, IMPOSE THE SENTENCE YOU RECOMMEND. SECTION 16-3-20 OF THE SOUTH CAROLINA CODE OF LAWS PROVIDES THAT FOR THE PURPOSE OF THIS SECTION LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE OFFENDER. PAROLE ELIGIBILITY IS NOT FOR YOUR CONSIDERATION.

MR. BANKS: WE WOULD ASK THE COURT TO TAKE OFF THE LANGUAGE OF PAROLE ELIGIBILITY IN THERE. BECAUSE HAVING RULED AGAINST US, I AM NOW ARGUING THAT TO IMPLY PAROLE ELIGIBILITY IS NOT TO BE CONSIDERED BY THEM IS TO IMPLY THAT IT IS AVAILABLE.

THE COURT: IT'S STICKY-WICKY ON THAT PROPOSITION BECAUSE THEY KEEP CHANGING THE LAW, BUT I'M GOING BACK AND [1951] LOOKING AT THESE CASES, AND THEY PRETTY WELL SAY, UNDER DIFFERENT LANGUAGE ADMITTEDLY, BUT THAT'S ALL I'VE GOT TO GO ON, PAROLE ELIGIBILITY, CASES AS LATE AS 1995, YOUNG, THE COURT CITING NORRIS, THE COURT CHARGED PURSUANT TO NORRIS THAT THE JURY WAS NOT TO CONSIDER

PAROLE ELIGIBILITY, AND GOES INTO THE PLAIN AND ORDINARY MEANING.

I KNOW THE STATUTE HAS CHANGED SINCE THEN. IT GOES FURTHER –

MR. POPE: YOUR HONOR. WITH ALL DUE RESPECT, YOUR HONOR, THIS COULD GO ON FOREVER. THE COURT HAS MADE A RULING, AND WE'VE BOTH BEEN GUILTY OF ARGUING WHEN THE COURT HAS MADE A RULING, BUT WE HAVE A JURY OUT, AND I WOULD ASK THAT YOU GIVE THE INSTRUCTION YOU SAID YOU WOULD.

THE COURT: I'LL DETERMINE WHEN TO DO THAT. I APPRECIATE IT, BUT I AM RELAXING THE RULES, I MEAN PARTICULARLY THIS IS A VERY THORNY ISSUE, WE ARE ALL AWARE OF THAT.

MR. POPE: YES, SIR.

THE COURT: AND THIS IS A DEATH PENALTY CASE; WE ARE ALL AWARE OF THAT.

MR. POPE: YES, SIR.

THE COURT: AND MY COMFORT LEVEL HAS TO BE WHERE I FEEL IT OUGHT TO BE.

MR. BANKS: YOUR HONOR, I'M NOT ASKING FOR LEAVE TO ARGUE AGAINST THE RULING, BUT INFORMING THE COURT. THE STATE [1952] OF THIS CASE HAS BEEN ARGUED IN THE STATE OF SOUTH CAROLINA VERSUS SUTHERLAND, AND THE STATE VERSUS SIMMONS, THE SIMMONS THAT I AM ARGUING, AND PERHAPS I HAVE NOT MADE

MYSELF CLEAR, IS SIMMONS VERSUS SOUTH CAROLINA 129 LAWYERS EDITION 2D, 133, SUPREME COURT 2187 WHICH IS A 1994 CASE.

MR. POPE: AND IT'S CITED IN SUTHERLAND, YOUR HONOR.

MR. BANKS: IT WAS REVERSED ON DUE PROCESS GROUNDS ON THE TRIAL COURT'S FAILURE TO TELL THE JURY THE TRUTH REGARDING THE CAPITAL OFFENDER'S PAROLE INELIGIBILITY IF SENTENCED TO LIFE IN PRISON –

THE COURT: ALL RIGHT, WHERE IS THAT? I'VE GOT THE CASE YOU'RE TALKING ABOUT.

MR. POPE: YOUR HONOR, IN SUTHERLAND THAT WE'VE HANDED UP IT'S HEADNOTE 2425 –

THE COURT: HE'S REFERRING ME TO A U.S. SUPREME COURT CASE.

MR. POPE: AGAIN, SIMMONS IS A U.S. SUPREME COURT CASE CITED IN SUTHERLAND.

THE COURT: I'VE JUST SIMPLY ASKED HIM TO SHOW ME WHERE IT WAS; THERE CAN'T BE ANYTHING OFFENSIVE ABOUT THAT. TELL ME WHERE IT IS?

MR. BANKS: YOUR HONOR, I JUST HAVE THE HEADNOTE.

THE COURT: THE WORD DANGEROUSNESS IS THE FIRST THING THAT POPS IN MY MIND. THAT'S FUTURE DANGEROUSNESS [1953] AGAIN. I'VE RULED.

MR. BANKS: I WOULD ASK THE COURT TO RULE ON OUR SECOND REQUEST THAT YOU STOP WHERE YOU SAY UNTIL THE DEATH OF THE OFFENDER. IT SEEMS TO ME THAT THE COURT IS GOING BACKWARDS IF YOU TELL THEM THEY CAN'T CONSIDER PAROLE ELIGIBILITY BECAUSE THAT CERTAINLY IMPLIES THAT HE MAY BE ELIGIBLE. SO, I AM GOING TO ASK THE COURT TO CHARGE WHAT YOU CHARGED THE JURY THE FIRST TIME.

THE COURT: I'M GOING TO STICK BY MY RULING. BRING THE JURY IN.

IN THE PRESENCE OF THE JURY:

THE COURT: MR. FOREMAN, I HAVE RECEIVED YOUR QUESTIONS. BEFORE I GET TO THAT, LET ME DO ONE HOUSEKEEPING MATTER. IT IS GETTING CLOSE TO 6:00 O'CLOCK, IT USUALLY TAKES 45 MINUTES OR SO OR AN HOUR TO GET ANY KIND OF MEAL HERE. IF YOU DETERMINE YOU WISH TO ORDER A MEAL FOR DINNER, JUST SEND US OUT A NOTE, AND WE WILL DO IT. I'M NOT ASKING YOU TO DECIDE THAT NOW, BUT I DON'T WANT YOU TO BE IN THERE WONDERING WHAT IS GOING ON AS FAR AS WHETHER YOU WILL GET TO EAT OR NOT. SO, IF YOU DECIDE AT ANY TIME THAT YOU DESIRE TO EAT, JUST LET US KNOW.

NOW, YOUR QUESTIONS WERE TWO. FIRST, QUOTE, IS THERE ANY REMOTE CHANCE THAT SOMEONE CONVICTED OF MURDER COULD BECOME ELIGIBLE FOR PAROLE, END QUOTE. AND

THE SECOND IS, QUOTE, UNDER WHAT CONDITIONS WOULD SOMEONE CONVICTED FOR [1954] MURDER BE ELIGIBLE, END QUOTE.

I ANSWER THAT IN THIS FASHION. YOUR CONSIDERATION IS RESTRICTED TO WHAT SENTENCE TO RECOMMEND. I WILL REMIND YOU THAT WHAT YOU RECOMMEND IS WHAT I WILL IMPOSE AS TRIAL JUDGE.

SECTION 16-3-20 OF OUR CODE OF LAWS AS APPLIES TO THIS CASE IN THE PROCESS WE'RE IN, STATES THAT, QUOTE, FOR THE PURPOSES OF THIS SECTION LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE OFFENDER, END QUOTE.

PAROLE ELIGIBILITY OR INELIGIBILITY IS NOT FOR YOUR CONSIDERATION.

ALL RIGHT, I'LL LET YOU GO BACK AND CONTINUE TO DELIBERATE.

(THE JURY RETIRED AGAIN AT 6:00 O'CLOCK P.M.)

IN CAMERA:

THE COURT: ALL RIGHT, IS THERE ANYTHING FROM THE STATE?

MR. POPE: NO, SIR, YOUR HONOR,

THE COURT: ANYTHING FROM THE DEFENSE?

MR: BANKS: YES, YOUR HONOR, WE WOULD RENEW OUR OBJECTION UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH

AMENDMENTS OF THE STATE AND FEDERAL CONSTITUTIONS.

THE COURT: YOUR EXCEPTION IS NOTED.

MR. BANKS: THANK YOU. IN ADDITION, YOUR HONOR, I WOULD ASK THE COURT TO CHARGE THE JURY THAT IF THEY ARE [1955] BETWEEN –

THE COURT: START OVER, I'M SORRY.

MR. BANKS: I'M GETTING TIRED, JUDGE.

THE COURT: NO, IT'S JUST A NOISY COURTROOM.

MR. BANKS: I WOULD ASK THE COURT TO ADVISE THE JURY THAT IF THEY ARE BETWEEN TWO POSSIBLE SENTENCES, THAT THE BENEFIT INURES TO THE DEFENDANT.

THE COURT: I DENY THAT.

MR. BANKS: THANK YOU.

THE COURT: ALL RIGHT, WE WILL BE AT EASE.

(THE JURY NOTIFIED THE COURT THAT THEY HAD AGREED ON A VERDICT AT 7:20 P.M.)

THE COURT: I UNDERSTAND WE HAVE A VERDICT. SOME OF YOU PERHAPS HAVE NOT BEEN HERE BEFORE. I ASK THAT YOU RESTRAIN ANY EMOTIONS, WHATEVER THE VERDICT MAY BE, AND I DO NOT KNOW WHAT IT WILL BE. IF YOU CANNOT, FEEL YOU CANNOT CONSTRAIN YOURSELF I ASK

THAT YOU LEAVE THE COURTROOM AT THIS TIME. IF YOU DO EXPRESS EMOTION AND DISRUPT THE COURT, YOU WILL BE IN CONTEMPT OF COURT, AND WE CERTAINLY DON'T WANT THAT BECAUSE I WOULD HAVE TO IMPOSE SOME SORT OF PENALTY ON THAT PERSON.

IS THERE ANYTHING FROM THE STATE BEFORE THE JURY COMES IN?

MR. POPE: NO, SIR, YOUR HONOR.

THE COURT: THE DEFENDANT?

[1956] **MR. BANKS:** NO, SIR.

THE COURT: ALL RIGHT, BRING THE JURY IN.

IN THE PRESENCE OF THE JURY:

THE COURT: MR. FOREMAN, I UNDERSTAND THE JURY HAS REACHED A VERDICT?

THE FOREMAN: YES, SIR.

THE COURT: IF YOU WOULD HAND IT UP BY WAY OF THE BAILIFF.

(THE VERDICT FORMS WERE GIVEN TO THE COURT.)

THE COURT: IN THE CASE OF THE STATE OF SOUTH CAROLINA VERSUS WESLEY AARON SHAFER, JR., COUNTY OF UNION, COURT OF GENERAL SESSIONS, 97-GS-44-419, PART ONE, THE JURY'S VERDICT ON PROOF OF AGGRAVATING CIRCUMSTANCE. WE, THE JURY IN THE ABOVE ENTITLED CASE, UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING

STATUTORY AGGRAVATING CIRCUMSTANCE: THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON. IT IS SIGNED BY ALL 12 JURORS.

PART TWO, THE JURY'S DETERMINATION OF THE SENTENCE TO BE IMPOSED. WE, THE JURY IN THE ABOVE ENTITLED CASE, UNANIMOUSLY RECOMMEND THAT THE DEFENDANT, WESLEY AARON SHAFER, BE SENTENCED TO DEATH. IT IS SIGNED BY ALL 12 JURORS.

WE WILL POLL THE JURY. MADAM CLERK, WILL YOU POLL THE JURY PLEASE.

[1957] **THE JURY WAS POLLED BY THE CLERK AS FOLLOWS:**

Q. BILLY F. ABEE; IS THIS THE VERDICT TO WHICH YOU AGREED?

A. IT IS.

Q. IS IT STILL YOUR VERDICT?

A. YES, IT IS.

THE COURT: DID YOU, MR. ABEE, FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT IN THIS CASE?

A. I DID.

Q. ARTONGA JONES, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES.

Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MS. JONES, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE IN THIS CASE BEYOND A REASONABLE DOUBT?

A. I DID.

Q. SUSAN ADAMS, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MS. ADAMS, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE IN THIS CASE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

[1958] Q. SHERRIE SUMNER, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MS. SUMNER, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE IN THIS CASE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

Q. JOHN T. JEFFRIES, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES.

Q. IS IT STILL YOUR VERDICT?

A. YES.

THE COURT: MR. JEFFRIES, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES.

Q. JOHN CRAIG, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES.

Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MR. CRAIG, DID YOU IN THIS CASE FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. I DID.

Q. DANIEL DAVIS, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

[1959] Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MR. DAVIS, DID YOU IN THIS CASE FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

Q. EMILY SMITH RUSSELL, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

A. YES, IT IS.

THE COURT: MS. RUSSELL, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE IN THIS CASE BEYOND A REASONABLE DOUBT?

A. YES, SIR, I DID.

Q. CHARLES MEADOW, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. IT IS.

Q. IS IT STILL YOUR VERDICT?

A. YES, IT IS.

THE COURT: MR. MEADOW, DID YOU FIND IN THIS CASE A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES, I DID.

Q. JILL LAWSON, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

[1960] A. YES, MA'AM.

THE COURT: MS. LAWSON, DID YOU IN THIS CASE FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

Q. JOHN GREGORY, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES.

Q. IS IT STILL YOUR VERDICT?

A. YES.

THE COURT: MR. GREGORY, DID YOU IN THIS CASE FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES.

Q. WAYNE HEFNEY, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

A. YES, IT IS.

THE COURT: MR. HEFNEY, DID YOU FIND IN THIS CASE A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

THE CLERK: THEY ALL ANSWERED IN THE AFFIRMATIVE.

THE COURT: IS THERE ANYTHING FROM THE STATE BEFORE THE JURY IS DISMISSED?

MR. POPE: NO, YOUR HONOR.

[1961] **THE COURT:** ANYTHING FROM THE DEFENSE?

MR. HANKS: YES, YOUR HONOR; I WOULD ASK THAT THE JURY BE EXCUSED.

THE COURT: I'M GOING TO ASK YOU TO GO TO THE JURY ROOM JUST FOR A FEW MINUTES.

IN CAMERA:

THE COURT: YES, SIR?

MR. BANKS: YOUR HONOR, BASED UPON THE ISSUES THAT WERE RAISED BY THE QUESTIONS FROM THE JURY, I WOULD ASK THE COURT TO POLL THE JURY AS TO THE SPECIFIC QUESTION AS TO WHETHER PAROLE ELIGIBILITY, THEIR BELIEF THEREIN, GAVE RISE TO THEIR VERDICT.

AT THE SAME TIME, I WOULD SPECIFICALLY REQUEST THAT THE COURT INQUIRE AS TO WHETHER JUROR NUMBER 233 WHO WORKS FOR PROBATION AND PAROLE, EXPRESSED PERSONAL KNOWLEDGE IN THE JURY'S DELIBERATION OUTSIDE OF THE EVIDENCE AND THE LAW GIVEN.

THE COURT: I DENY THAT REQUEST. ANYTHING FURTHER?

MR. BANKS: NO, SIR.

THE COURT: WELL, I AM GOING TO DISMISS THE JURY, AND THEN WE WILL TAKE CARE OF OTHER BUSINESS. BRING ALL 14 JURORS IN.

IN THE PRESENCE OF THE JURY:

THE COURT: MEMBERS OF THE JURY PANEL, FIRST I WANT TO THANK YOU FOR YOUR

ASSISTANCE; THIS HAS BEEN TOUGH. I [1962] APPRECIATE YOUR PATIENCE WITH ME; I APPRECIATE YOUR TIME AND YOUR CONSCIENTIOUS FULFILLMENT OF YOUR DUTIES. I'M NOT GOING TO KEEP YOU, YOU'VE BEEN HERE LONG ENOUGH.

I DO WANT TO TELL YOU, AND I'M GOING TO GIVE YOU THIS IN WRITING AS YOU LEAVE, OUR SUPREME COURT HAS INSTRUCTED IN CASES SUCH AS THIS THAT I GIVE YOU THE FOLLOWING INSTRUCTIONS. THIS IS BASED ON A STATUTE PASSED BY OUR LEGISLATURE:

AFTER YOUR SERVICE IN THIS TRIAL HAS CONCLUDED, YOU HAVE THE RIGHT TO EITHER REFUSE TO DISCUSS THE VERDICT YOU HAVE RENDERED OR TO DISCUSS THE VERDICT TO THE EXTENT YOU SO DESIRE.

IF YOU CHOOSE TO DISCUSS THE VERDICT, YOU ARE FREE TO TERMINATE, WHICH OF COURSE MEANS TO STOP, ANY SUCH DISCUSSION AT ANY POINT. IF THE PERSON WITH WHOM YOU ARE SPEAKING CONTINUES TO PURSUE A DISCUSSION OF THE VERDICT AFTER YOU HAVE COMMUNICATED A DESIRE TO TERMINATE THE DISCUSSION OR IF THE PERSON CONTINUES TO HARASS YOU AFTER YOU HAVE REFUSED TO DISCUSS THE VERDICT, YOU SHOULD REPORT THAT PERSON TO THE HONORABLE JUNE H. MILLER, UNION COUNTY CLERK OF COURT, P.O. BOX 200, UNION, SOUTH CAROLINA 29379; TELEPHONE NUMBER 864-429-1630. SIGNED BY ME AND DATED THIS DAY.

I WILL HAVE THE BAILIFF TO HAND ONE OF THESE TO EACH OF YOU. GO AHEAD WHILE THEY ARE STILL SEATED.

(EACH JUROR WAS GIVEN THE PAPER.)

[1963] **THE COURT:** IS THERE ANYTHING FURTHER FROM THE STATE?

MR. POPE: NOTHING FURTHER, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. BANKS: NO, SIR.

THE COURT: AGAIN, I THANK YOU VERY MUCH FOR YOUR ASSISTANCE IN THIS MATTER. YOU MAY EXIT THE COURTROOM. (AFTER THE JURY LEFT THE COURTROOM)

THE COURT: ALL RIGHT, WOULD YOU BRING MR. SHAFER AROUND?

(THE DEFENDANT, ALONG WITH HIS COUNSEL, APPROACHED THE BENCH.)

THE COURT: IS THERE ANYTHING FROM COUNSEL FOR THE DEFENDANT?

THE COURT: YOUR HONOR, WE WOULD LIKE TO HAVE LEAVE OF 10 DAYS TO MAKE POST TRIAL MOTIONS. NOTHING AS TO SENTENCING, YOUR HONOR.

THE COURT: MR. SHAFER, IS THERE ANYTHING YOU WISH TO SAY?

MR. SHAFER: NO, SIR.

THE COURT: YOU DON'T WANT TO SAY ANYTHING?

MR. SHAFER: I APOLOGIZE TO THE FAMILY.

THE COURT: I FIND AFFIRMATIVELY THAT THE DEATH PENALTY IN THIS CASE WAS WARRANTED UNDER THE EVIDENCE OF THIS CASE AND WAS NOT THE RESULT OF PREJUDICE, BIAS OR IN ANY [1964] OTHER ARBITRARY MANNER.

MR. SHAFER, ON 97-GS-44-420, THE INDICTMENT ON THE ATTEMPTED ARMED ROBBERY, THE SENTENCE OF THE COURT IS FOR THIRTY YEARS, AND THAT'S CONSECUTIVE TO THE SENTENCE ON THE MURDER CHARGE WHICH IS 97-GS-44-419.

ON 97-GS-44-421, CRIMINAL CONSPIRACY, THE SENTENCE OF THE COURT IS FOR FIVE YEARS. THAT'S CONSECUTIVE TO BOTH 97-GS-44-419, AND 97-GS-44-420. THE SENTENCE ON 97-GS-44-419, THE CHARGE OF MURDER, THE SENTENCE OF THE COURT IS THAT WESLEY AARON SHAFER, THE DEFENDANT NAMED IN THIS INDICTMENT, IS SENTENCED TO DEATH.

THE SENTENCE HEREIN IS PURSUANT TO SECTION 16-3-20 OF THE CODE OF LAWS. BY VIRTUE OF THE FINDING OF THE JURY ON THIS THE 21ST DAY OF JANUARY, 1998, MR. SHAFER, YOU ARE TO BE KEPT INCARCERATED BY THE APPROPRIATE AUTHORITIES, AND SUFFER THE SENTENCE OF DEATH BETWEEN THE HOURS OF 6:00 A.M. AND 6:00 P.M. ON JUNE 21ST, 1998.

DO YOU UNDERSTAND ALL OF THAT?

MR. SHAFER: YES, SIR.

THE COURT: ANYTHING ELSE?

MR. ALL: YES, YOUR HONOR, THE PENALTY FOR THE ATTEMPTED ARMED ROBBERY, WHAT IS THE SENTENCE ON THAT?

MR. POPE: MAY WE APPROACH, YOUR HONOR?

THE COURT: YES.

(COUNSEL APPROACHED THE BENCH AND HAD A CONFERENCE WITH THE [1965] COURT OFF THE RECORD)

THE COURT: IT'S BEEN CALLED TO MY ATTENTION, I DID MAKE AN ERROR. THE SENTENCE ON 97-GS-44-420, MR. SHAFER, INSTEAD OF THIRTY YEARS IS TWENTY YEARS, AND THAT'S CONSECUTIVE TO THE MURDER CHARGE. ANYTHING FURTHER FROM THE STATE?

MR. POPE: NO, SIR, YOUR HONOR.

THE COURT: ANYTHING FURTHER FROM THE DEFENSE?

MR. BANKS: NO, SIR.

THE COURT: I AM GOING TO ASK THAT THE INDIVIDUALS ON THE LEFT REMAIN SEATED WHILE THE INDIVIDUALS ON THE RIGHT EXIT, AND THEN THE INDIVIDUALS ON THE LEFT CAN EXIT THE COURTROOM.

ALL RIGHT, COURT IS ADJOURNED.

(WHEREUPON, THE CASE ENDED.)

[Note from Sentencing Jury]

[Handwritten Originally]

1) Is there any remote chance for someone convicted of murder to become eligable [sic] for parole?

2) Under what conditions would someone convicted for murder be eligable. [sic]

Court's Exhibit #7
1-21-98 JF

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Wesley Aaron Shafer, Jr., Appellant.

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25120
Heard October 7, 1999 – Filed May 8, 2000

AFFIRMED

David I. Bruck, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Ray Broome while attempting to rob the convenience store where Broome was working. Appellant maintained the killing was without malice.[1] A jury

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[1] During the penalty phase of trial, appellant's expert witness testified appellant shot Broome in response to a lifetime of abuse and violence.

convicted appellant of murder, attempted armed robbery, and conspiracy. He was sentenced to death for murder and consecutive terms of twenty years' imprisonment and five years' imprisonment, respectively, for attempted armed robbery and conspiracy.[2] Appellant appeals.

FACTS

Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.

At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.

Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned outside.

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[2] The jury found the statutory aggravating circumstance of murder while in the commission of an attempted armed robbery while armed with a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) (Supp. 1998).

Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the register counter, and shot Broome a second time.[3] Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.

Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store, found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head.[4] Broome died at the hospital.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him,

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[3] Appellant waited eight seconds before firing the second shot.

[4] All the events inside the Hot Spot were recorded on the store's security camera.

and I'm the one that had the gun, and I guess I just snapped."

ISSUES[5]

I. Did the trial court err by refusing to instruct the jury appellant was parole ineligible?

II. Did the trial judge err by granting the State's motion to prohibit both the prosecution and defense from referring to the Bible or using religious references during closing argument?

III. Did the trial judge err by refusing to allow appellant to reopen the record to present evidence on deterrence or, alternatively, for a curative instruction after the solicitor argued the general deterrent effect of the death penalty?

DISCUSSION

I.

Appellant argues, for various reasons, the trial court erred by refusing to instruct the jury he was parole ineligible. We disagree.

After closing arguments, relying on *Simmons v. South Carolina*, 512 U.S. 154 (1994), appellant requested the trial court instruct the jury he would be ineligible for parole. The trial court denied the request.

Thereafter, the trial judge instructed the jury "life imprisonment means until the death of the defendant."

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[5] All issues stem from the sentencing phase of appellant's trial.

He later stated: "[i]n deciding whether to sentence the defendant to death or to life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death."

After three and one-half hours of deliberation, the jury returned with the following questions:

> 1. Is there any remote chance for someone convicted of murder to become eligible for parole?
>
> 2. Under what conditions would someone convicted for murder be eligible?

Regarding Question 1, appellant agreed the trial court should instruct the jury "life imprisonment means until the death of the offender" and requested the court read the portion of § 16-3-20(A) which explains no person sentenced to life imprisonment is eligible for parole or any other form of release or credits which would reduce a life sentence. Appellant stipulated Question 2 could not be answered. After the trial judge informed the parties of his intended response to the jury's questions, appellant requested the trial judge delete any reference to parole eligibility.[6]

The trial judge responded to the jury's questions as follows:

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[6] The trial judge stated he would charge the jury as follows: "[y]our consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16-3-20 of the South Carolina Code of Laws provides that for the purpose of this section life imprisonment means until the death of the offender. Parole eligibility is not for your consideration."

> Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge. Section 16-3-20 of our Code of Laws as applies to this case in the process we're in states that, 'for the purposes of this section life imprisonment means until the death of the offender.' Parole eligibility or ineligibility is not for your consideration.

Appellant excepted stating, "we would renew our objection under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the State and Federal Constitutions." The trial judge noted the exception.

A.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends *Simmons* mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. *Id.; State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future

danger to society." *Simmons*, 512 U.S. at 165 (1994) (plurality opinion).

Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp. 1998). Under the new sentencing scheme, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. We recently held *Simmons* is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. *State v. Starnes*, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 17).[7] Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues *Simmons* mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read *Simmons* so narrowly. By its own terms, *Simmons* requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to

[7] In *Starnes*, we suggested, under the terms of the statute, it is arguable a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

the defendant. *Simmons*, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death *under state law* was life imprisonment without the possibility of parole . . . ".) (emphasis added). This interpretation is supported by decisions from other jurisdictions. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999) (*Simmons* is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995), *cert. denied*, 519 U.S. 825 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and, therefore *Simmons* is inapplicable); *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995) (*Simmons* applies where capital defendant is ineligible for parole as a matter of law; *Simmons* does not apply even if it is unlikely defendant would be paroled); *People v. Simpson*, 665 N.E.2d 1228 (Ill.), *cert. denied*, 519 U.S. 982 (1996) (*Simmons* inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); *State v. McLaughlin*, 462 S.E.2d 1 (N.C. 1995), *cert. denied*, 516 U.S. 1133 (1996) (*Simmons* inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since

one of these alternatives to death was not life without the possibility of parole, *Simmons* was inapplicable.[8]

B.

Appellant contends the failure to inform the jury he was parole ineligible violated the Eighth Amendment prohibition against the arbitrary infliction of the death penalty.[9] He specifically argues the failure to inform the jury of his parole ineligibility prevented him from presenting mitigating evidence in support of a sentence less than death and diminished the reliability of the jury's sentencing decision. In light of the new sentencing statute, he asks the Court to reconsider its policy prohibiting

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[8] The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting *Flores*, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In *Flores*, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in *State v. Starnes, supra*, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

[9] U.S. Const. amend. VIII.

the trial judge from informing the jury a capital defendant is parole ineligible.

Initially, we note this issue is not properly preserved for appellate consideration. After the trial judge responded to the jury's question, appellant stated he excepted "on the basis of the Eighth Amendment." He offered no explanation or argument in support of the exception. Appellant's objection to the supplemental instruction is simply too vague for the Court to review. *State v. Bailey*, 253 S.C. 304, 170 S.E.2d 376 (1969) (general objection leaves nothing for Court to review). Clearly, appellant never argued, as he does now, that the Eighth Amendment requires a charge on parole ineligibility as mitigating evidence and to ensure the reliability of the sentence imposed. *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge).

In any event, the Eighth Amendment requires that a death sentence not be imposed arbitrarily. *Jones v. United States*, 527 U.S. 373 (1999). It prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty. *Payne v. Tennessee*, 501 U.S. 808, 822 (1991), *citing Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The United States Supreme Court has "deferred to the State's choice of substantive factors relevant to the penalty determination." *California v. Ramos*, 463 U.S. 992, 1001 (1983). Whether parole eligibility is relevant to the sentencing determination is a matter of state law. *Id.; see Simmons v. South Carolina*, 512 U.S. 154,

176 (O'Connor, J., concurring) ("[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the States.").[10]

In South Carolina, parole eligibility is not relevant to a jury's sentencing considerations. *State v. Young*, 319 S.C. 33, 459 S.E.2d 84 (1995) (defendant who was parole eligible after service of thirty years not entitled to charge on parole eligibility). The refusal to inform the jury of the capital defendant's parole eligibility does not violate the Eighth Amendment. *Id.*

Although we have never explicitly ruled whether the Eighth Amendment entitles a capital defendant to a charge informing the jury he is parole *in*eligible, precedent suggests no such instruction is required.[11] In *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (Chandler, J., concurring), the Court held the defendant who was parole ineligible due to a prior conviction for a violent crime was not entitled to a charge informing the jury of his parole ineligibility. In *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied* 513 U.S. 1166 (1995), *overruled on other grounds State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995), we concluded there was no Eighth Amendment violation where the trial judge did not instruct the jury the defendant was parole ineligible but

[10] *O'Dell v. Netherland*, 521 U.S. 151, 165 (1997) ("[i]n *Simmons*, the Court carved out an exception to the general rule described in *Ramos* by, for the first time ever, requiring that a defendant be allowed to inform the jury of the postsentencing legal eventualities.").

[11] Appellant agrees there has been a blanket prohibition against any instruction on parole eligibility or ineligibility.

defense counsel argued "life imprisonment" means the defendant will never be released from prison. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the United States Supreme Court declined to hold the Eighth Amendment requires the jury to be informed a capital defendant is parole ineligible.

Relying on *Skipper v. South Carolina*, 476 U.S. 1 (1986), appellant asserts parole ineligibility is a mitigating circumstance of which the jury should have been informed. We disagree.

As noted above, the Eighth Amendment prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence." *Payne v. Tennessee*, 501 U.S. 808, 822 (1991). For purposes of the Eighth Amendment, mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Skipper v. South Carolina*, 476 U.S. 1, 4, *citing Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *see State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt). In *Skipper*, the Supreme Court held evidence of the defendant's good behavior while in jail awaiting trial was potentially mitigating because it indicated he would not pose a danger in the future. Accordingly, excluding evidence of the defendant's future adaptability violated the Eighth Amendment.

Unlike a defendant's behavior in prison, parole ineligibility is not an aspect of a defendant's character or record. Parole eligibility or ineligibility is a legislative determination; it is not mitigating evidence. *See State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989), *vacated on other grounds* 493 U.S. 1013 (1990) (information regarding requirements for parole eligibility is not mitigating evidence); *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988), *cert. denied*, 489 U.S. 1091 (1989) (punishment for a crime cannot serve as a mitigating sentencing consideration); *see also State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (the general effect of capital punishment as a deterrent to crime is not a mitigating circumstance). The Eighth Amendment is not violated by refusing to inform the jury a capital defendant is parole ineligible.

Appellant asserts since all capital defendants are now parole ineligible, the Court should permit juries to be informed of parole ineligibility. He claims providing juries with accurate information on parole ineligibility will eliminate prejudicial misinformation juries hold concerning parole eligibility and produce more reliable sentencing determinations. We disagree.

Traditionally, in South Carolina it is the jury's duty and responsibility in the sentencing phase of a capital trial to impose a punishment authorized by law in consideration of the circumstances of the crime and the characteristics of the individual defendant. The jury is not authorized to legislate a plan of punishment. *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, *cert. denied* 467 U.S. 1265 (1984); *see State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970), *citing State v. White*, 142 A.2d 65, 76 (N.J. 1958) ("the Legislature committed to the jury the responsibility

to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs."), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). The jury's duty is the same under the new sentencing statute. While a defendant's parole ineligibility could affect the jury's decision, it nonetheless remains an irrelevant factor which the jury should not consider. Affirmatively mentioning an irrelevant factor would undermine the jury's decisionmaking process and result in a decision which is less, rather than more, reliable. As a matter of policy, we maintain it is inappropriate to inform the jury the capital defendant is parole ineligible. The Eighth Amendment does not compel a different result. *Jones v. United States*, 527 U.S. 373, ___, 119 S.Ct. 2090, 2099 (1999) (a death sentence is not arbitrary within the meaning of the Eighth Amendment "if the jury is not given any bit of information that might possibly influence the individual juror's voting behavior.").

C.

Appellant argues the trial judge's supplemental instruction was erroneous. He contends 1) in responding to the jury's questions, the trial judge should have informed the jury he was parole ineligible, 2) the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," incorrectly suggested he was parole eligible, and 3) the trial judge erred by refusing to

read that portion of the sentencing statute which referred to parole ineligibility. We disagree.

1.

As noted above, parole eligibility or ineligibility is not relevant to a capital jury's sentencing considerations and the issue of parole should not be injected into the jury's deliberations. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). When a *jury inquires* about parole, the trial court should instruct the jury it shall not consider parole eligibility in reaching its decision and the terms "life imprisonment" and "death penalty" should be understood in their ordinary and plain meaning. *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985), *overruled on other groundsState v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).[12]

In keeping with *Norris*, the trial judge's supplemental instruction properly told the jury not to consider parole eligibility or ineligibility. Although *Norris* was decided prior to the new sentencing statute, we find no reason to require a different response when the jury inquires about parole.

Moreover, as noted above, three potential sentences were available: 1) death, 2) life imprisonment, or 3) a

[12] In *Ard* we held the trial judge's erroneous mention of parole was harmless. To the extent *Ard* suggests the trial judge should charge the jury on parole eligibility if requested by the defendant, it is overruled. We note *Ard* was decided eight months after the present case was tried.

mandatory minimum thirty year sentence. Appellant was not eligible for parole under any of these sentences.[13] Nonetheless, as suggested by appellant, by asking for information on parole, the jury was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment. Informing the jury appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

2.

Furthermore, contrary to appellant's argument, the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," did not suggest appellant was parole *eligible*. Unlike the admonitions in *Simmons v. South Carolina*, 512 U.S. 154 (1994), "you are not to consider parole" and parole "is not a proper issue for your consideration," the instruction here specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole eligible.

3.

Finally, in response to the jury's questions, appellant requested the trial judge read that portion of the sentencing statute highlighted below:

[13] *But see* footnote 7.

A person who is convicted of or pleads guilty to murder must be punished by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. **If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, 'life imprisonment' means until the death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.** No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.

Section 16-3-20(A) (Supp. 1998).

We find no error or prejudice from the trial judge's refusal to read the highlighted portion of the statute. Again, neither parole eligibility nor parole ineligibility are proper considerations for the jury. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Torrence*, 305 S.C.

45, 406 S.E.2d 315 (1991). Furthermore, appellant's suggestion that providing the jury with the highlighted language would promote "truth-in-sentencing" is tenuous. The highlighted text provides the jury with only those portions of the sentencing statute which appellant deems favorable but excludes any reference to other less favorable sentencing options.

We conclude the supplemental instruction was appropriate.

II.

Appellant argues he was deprived of his right to make religious arguments to the jury. We disagree.

Over appellant's objection, the trial judge granted the State's motion to prohibit references to the Bible or religion during closing argument by both the prosecution and defense. Appellant proffered several religious arguments he had considered including in his closing argument.

In his closing argument, appellant stated:

> There's a story about a woman who broke the law a long, long, long time ago. Before we had electricity, before we had lethal injection, we still had the death penalty. There was a time that she had been caught, she was caught for breaking the law, and the people in her community gathered around her, and they were going to kill her for what she had done. They had the objects they were going to use to kill her in their hands, and she stood before them. Somebody walked in and said 'I'm not denying that what she did was wrong, this isn't about what she did was wrong,

> this is about what statement are you going to make about being confronted with this.'
>
> The story that I referenced, a very great man discussed with them about not killing the woman, and they didn't.

We find no error in the trial judge's ruling. Previously, we have held there is no fundamental unfairness when the trial judge precludes the solicitor and the defense from arguing about God or religion. *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied* 522 U.S. ___, 118 S.Ct. 146 (1997). In any event, the record clearly demonstrates appellant was not prejudiced by the trial judge's ruling. Although he was not permitted to make all of his religious arguments, appellant conveyed the Biblical story of Jesus and the adulterous woman. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997) (capital defendant was not prejudiced by sustained objection to his religious argument where record indicated he made the argument nonetheless). The trial judge did not abuse his discretion in granting the State's motion to prohibit references to the Bible or religion during both the prosecution and defense closing arguments. *See State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986)[14] (trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed).

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[14] *Overruled on other grounds Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *State v. Casey*, 305 S.C. 445, 409 S.E.2d 391 (1991).

III.

In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.

In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996).[15] Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.

Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general deterrence. *See State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), *cert. denied* 519 U.S. ___, 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); *State v. Longworth*, 313 S.C. 360,

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[15] Because the General Assembly has approved the propriety of capital punishment, evidence attempting to establish its effectiveness or ineffectiveness as an instrument of deterrence is irrelevant.

438 S.E.2d 219 (1993), *cert. denied* 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge general deterrence need not be considered); *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied* 471 U.S. 1036 (1985), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatedly allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. *State v. Truesdale*, 301 S.C. 546, 393 S.E.2d 168, *cert. denied* 498 U.S. 1074 (1990); *State v. Jones*, 298 S.C. 118, 378 S.E.2d 594 (1989); *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied* 462 U.S. 1124 (1983), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

PROPORTIONALITY REVIEW

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance is supported by the

evidence. *See* S.C. Code Ann. § 16-3-25 (1985). Further, we hold the death penalty is neither excessive nor disproportionate to that imposed in similar cases. *See State v. Hughes*, 328 S.C. 146, 493 S.E.2d 821 (1997), *cert. denied*, 523 U.S. ___, 118 S.Ct. 1674 (1998); *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied*, 522 U.S. ___, 118 S.Ct. 146 (1997); *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57, *cert. denied*, 520 U.S. ___, 117 S.Ct. 2460 (1996); *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52, *cert. denied*, 520 U.S. ___, 117 S.Ct. 2441 (1996); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), *cert. denied*, 519 U.S. ___, 117 S.Ct. 695 (1997); *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991), *cert. denied*, 502 U.S. 1103 (1992).

AFFIRMED.

MOORE, WALLER, JJ., and Acting Justice Thomas C. Huff, concur. FINNEY, C.J., dissenting in a separate opinion.

FINNEY, C.J.: I respectfully dissent, and would reverse and remand for a new sentencing proceeding.

Under the 1996 amendments to S.C. Code Ann. § 16-3-20, all capital defendants face one of three sentences:

(1) death; or

(2) life in prison until death; or

(3) unconditional release after service of a minimum term of thirty years, with no possibility of parole.[1]

Appellant contends that since he was parole ineligible as a matter of state law, the jury was entitled to be charged this fact when they inquired. I agree.

The majority deems the holding in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994), inapplicable because appellant's sentencing options were not limited to death or life without possibility of parole, and cites a number of cases in support of this proposition. In all the cited cases except one, however, the defendant's sentencing possibilities included one in which he would be parole eligible. The only case in

[1] In this opinion and in *State v. Starnes*, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000), the Court has avoided directly deciding the parole eligibility status of a capital defendant who receives a term of years sentence. In my opinion, we must decide this question today in order to address the jury charge issues raised by appellant. The murder statute is clear as to certain defendants: "No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole . . . or any other credits which would reduce the mandatory minimum term of imprisonment for thirty years required by this section." § 16-3-20(A) (Supp. 1999). Since the murder statute is silent as to the parole eligibility of defendants receiving a sentence in excess of the mandatory minimum, the general rule controls. Under § 16-1-10(d) (Supp. 1999), murder is exempt from the classification system, and under § 24-13-100 (Supp. 1999), persons convicted of exempt offenses are ineligible for parole. Thus, although a capital defendant may receive a sentence of a term of years, he is ineligible for parole whatever the duration of that term.

which the defendant did not face a potential parolable sentence was *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995). *Flores* involves a federal conviction, and parole has been abolished in the federal system. It is inapposite to the present South Carolina sentencing scheme, as are all the other cases cited. While I concede that *Simmons* does not directly control this case[2], the overriding principle to be drawn from that decision is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected. Here, the jury's inquiry prompted a misleading response which suggested parole was a possibility. In my opinion, due process mandates reversal.

Further, if the decision whether to inform juries which inquire about parole eligibility is simply one of policy, as the majority suggests in Part I C, then why not adopt a policy which gives the jurors the simply [sic] truth: no parole. The majority acknowledges, as it must,[3] that parole considerations "could" affect a jury's sentencing decision,[4] but then deems it "irrelevant" and denigrates its importance as "[a] bit of information that might

[2] We are not concerned with whether a *Simmons* charge was warranted at the initial charge to the jury since future dangerousness was not an issue, but rather with the procedure to be followed when a capital jury inquires about parole.

[3] Given the regularity with which capital juries inquire about parole, we cannot deny its role in sentencing.

[4] See Bowers, Vandiver & Dugan, *A New Look at Public Opinion On Capital Punishment: What Citizens and Legislators Prefer*, 22 Am.J.Crim.L. 77 (1994).

possibly influence the individual juror's voting behavior." The specter of parole haunts every capital sentencing proceeding in this State, and I cannot understand why, given the simplicity of our new sentencing scheme in which no capital defendant is ever parole eligible, we would make a policy decision prohibiting the dissemination of the truth.

Of course, I would not stop with a charge that the defendant was not parole eligible, for that is only half the truth. I would tell the jury that if no aggravating circumstance is found, the defendant faces a minimum of thirty years without possibility of early release, but that if aggravating circumstances are found, then the alternatives are death or life in prison until death.

For these reasons, and with instructions that henceforth juries which inquire shall be charged the truth about sentencing, I would reverse and remand for a new sentencing proceeding in this matter.

The Supreme Court of South Carolina

The State, Respondent,

v.

Wesley Aaron Shafer, Jr., Petitioner.

ORDER

This Court recently affirmed petitioner's murder conviction and his death sentence. *State v. Shafer,* Op. No. 25120 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 35). Petitioner has now filed a consent motion seeking a stay of remittitur and a stay of execution to allow him to file a petition for a writ of certiorari with the United States Supreme Court. Respondent agrees that petitioner is entitled to a stay of execution since petitioner's proposed questions are appropriate for inclusion in a petition for a writ of certiorari to the United States Supreme Court. *In re Stays of Execution in Capital Cases,* 321 S.C. 544, 471 S.E.2d 140 (1996).

Petitioner's request for a stay of remittitur is denied. Petitioner's request for a stay of execution is granted. The stay of execution shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases.*

IT IS SO ORDERED.

/s/ James E. Moore A.C.J.

/s/ John H. Waller Jr. J.

/s/ Illegible J.

/s/ Illegible J.

Toal, C.J., not participating

Columbia, South Carolina

June 6, 2000

Supreme Court of the United States

SHAFER, WESLEY A. V. SOUTH CAROLINA.

No. 00-5250.

Sep. 26, 2000.

The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply.

Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

No. 00-5250

In The

Supreme Court of the United States

WESLEY AARON SHAFER, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether petitioner's due process rights under *Simmons v. South Carolina*, 512 U.S. 154 (1994), were violated by the trial court's refusal to instruct the sentencing jury that "under South Carolina law, [petitioner] would be ineligible for parole if the jury were to vote for a life sentence," *Ramdass v. Angelone*, 120 S. Ct. 2113, 2119 (2000) (plurality opinion), and by the South Carolina Supreme Court's holding that *Simmons* no longer applies to South Carolina's capital sentencing scheme.

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CITATION TO OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported as *State v. Shafer*, 531 S.E.2d 524 (S.C. 2000), and is reprinted in the Joint Appendix at 254-78. The order of the South Carolina Supreme Court granting a stay of execution pending the disposition of the petition for writ of certiorari is unreported, and is reprinted in the Joint Appendix at 279-80. The order of this Court granting the petition for writ of certiorari, limited to the first question presented by the petition, is reprinted in the Joint Appendix at 281.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on May 8, 2000. The petition for writ of certiorari was filed on July 14, 2000, and granted on September 26, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any state deprive any person of life . . . without due process of law. . . . "

2. It also involves S.C. Code Ann. § 16-3-20 (Supp. 1999), which code section is reprinted *infra* at App. 1-8.

STATEMENT OF FACTS

A. South Carolina's capital sentencing statutes

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that when a capital defendant's future dangerousness is at issue, due process entitles him to inform the sentencing jury that state law precludes his release on parole from a sentence of life imprisonment. About a year after *Simmons*, the South Carolina legislature abolished parole for all convicted murderers. Act No. 83, § 10, 1995 S.C. Acts 557, *codified as* S.C. Code Ann. § 16-3-20 (Supp. 1999), *infra*, App. 1-8. As thus amended, South Carolina's capital sentencing scheme provides that:

- The death penalty is available as a punishment for any murder (defined as "the killing of any person with malice aforethought," S.C. Code Ann. § 16-3-10 (1985)), so long as the prosecution files pretrial notice of its intention to seek the death penalty, and the sentencing jury finds the existence of at least one statutory aggravating circumstance.

- Where the state seeks the death penalty and the sentencing jury finds the existence of a statutory aggravating factor, the only two sentences available to the jury

are death and life imprisonment without eligibility for parole or any other means of release.[1]

- If the jury does *not* find any statutory aggravating circumstance to exist, the trial judge is then required, without further participation by the jury, to impose a sentence ranging from a minimum of 30 years to a maximum of life imprisonment. S.C. Code Ann. § 16-3-20(C).

- In addition to the evidence supporting the statutory death-eligibility factors, the prosecution may introduce evidence of a wide range of nonstatutory aggravating factors – including the defendant's bad or violent character, prior criminal behavior, and lack of potential for rehabilitation – provided the prosecution furnishes the defendant with written notice of such evidence prior to trial. S.C. Code Ann. § 16-3-20(B).

- After finding a statutory aggravating circumstance, the jury may consider all nonstatutory aggravating factors in deciding whether to impose the death penalty, but the jury is provided with no document identifying such nonstatutory factors.

- Before the jury may impose either life imprisonment or the death penalty, all 12 jurors must identify in

---

[1] S.C. Code Ann. § 16-3-20(A) provides,

> For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.

writing the statutory aggravating circumstance or circumstances they found to exist beyond a reasonable doubt, S.C. Code Ann. § 16-3-20(C), but no jury findings of any kind are required with respect to nonstatutory aggravating factors.[2]

B. Petitioner's offense, pretrial filings, and trial.

The 1995 no-parole legislation went into effect on January 1, 1996. The following year, petitioner, then 18 years old, shot and killed a convenience store operator during a robbery attempt. The South Carolina Supreme Court summarized the facts of the crime as follows:

> Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and

---

[2] "South Carolina's death penalty sentencing scheme 'was patterned after the death penalty statutes of . . . Georgia,' " *State v. Locklair*, Opinion No. 25161, 2000 WL 978576 (S.C., June 26, 2000), *quoting State v. Shaw*, 255 S.E.2d 799, 802 (S.C. 1979), and is thus a "nonweighing" scheme. *See Stringer v. Black*, 503 U.S. 222, 231-32 (1992). Under such statutes, death eligibility is established by proof of a single statutory aggravating circumstance, S.C. Code Ann. § 16-3-20(C) (Supp. 1999), and the sentencing jury is then authorized at the "selection" stage to consider all facets of the crime and of the defendant's character and prior record in deciding whether to impose the death penalty or life imprisonment. *State v. Shaw*, 255 S.E.2d at 808; *State v. Plath*, 313 S.E.2d 619, 623 (S.C. 1984); *see also Zant v. Stephens*, 462 U.S. 862, 872 (1983) (" 'In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.' " (quoting from Georgia Supreme Court's description of Georgia statute)).

> Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.
>
> At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.
>
> Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned outside.
>
> Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the register counter, and shot Broome a second time. [FN. 3]. Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.
>
> FN3. Appellant waited eight seconds before firing the second shot.
>
> Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store,

found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head. [FN4] Broome died at the hospital.

> FN4. All the events inside the Hot Spot were recorded on the store's security camera.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him, and I'm the one that had the gun, and I guess I just snapped."

JA 255-57; 531 S.E.2d at 526-27.

A month later, a Union County grand jury indicted petitioner for murder, attempted armed robbery and conspiracy, JA 2-4, and the state promptly served notice of its intent to seek the death penalty. JA 4-5. The notice listed two statutory aggravating circumstances – armed robbery and larceny while armed with a deadly weapon – which the state intended to prove in order to establish petitioner's eligibility for the death penalty. *Id.*; S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e) (Supp. 1999). Later, pursuant to a statutory requirement that the state "inform[ ] the defendant in writing prior to the trial" of its evidence

in aggravation of punishment, S.C. Code Ann. § 16-3-20(B), the prosecution also served a document advising petitioner that the state intended to introduce, *inter alia*,

- "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm as an adult and a juvenile," JA 6,
- "evidence . . . as to the Defendant's character and conduct while incarcerated in jails and/or prisons as an adult and a juvenile . . . " JA 7,
- "evidence . . . relating to his release or parole from jails and/or prisons as an adult and a juvenile; opinions as to the Defendant's character, propensity for violence and unlawful conduct, disregard for peace and good order and to commit such acts in the future." JA 8.

These future dangerousness allegations did not fall within any statutory aggravating circumstance under South Carolina law. However, South Carolina prosecutors often present evidence calculated to persuade juries of capital defendants' future dangerousness, because "[a]lthough South Carolina statutes do not mandate consideration of the defendant's future dangerousness in capital sentencing, the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." *Simmons*, 512 U.S. at 162-63 (plurality opinion).

The first reference to the issue of parole ineligibility at petitioner's trial occurred just prior to the start of jury selection, when the state successfully opposed defense counsel's request that the court describe the alternative to

a death sentence to prospective jurors as "life imprisonment without possibility of parole." JA 10-11. Urging the trial court to refrain from any references to life without parole during jury selection, the prosecutor stated,

> I think the issue of whether or not life is without parole or what should be told to the jury in that regard should be handled at the close of the case per the judge's instructions. It would partially be based on *Simmons*, and whether or not they made a dangerousness argument, and based on that I would request that you use the [jury] questionnaire that has been used in the past.

JA 11. The trial judge agreed, indicating his belief that the necessity of crafting jury instructions concerning the meaning of life imprisonment "is limited to the 12 that decide," and such instructions were unnecessary at the jury selection phase of the proceedings. *Id.*

The prosecution's next successful effort to keep the jury from learning about the non-existence of parole for convicted murderers came during the state's case in the guilt-or-innocence phase of petitioner's trial. After the direct testimony of Joseph Mullinax, an accomplice in the murder who was testifying for the prosecution, the prosecutor moved outside the jury's presence that defense counsel be prohibited from eliciting on cross-examination that the witness was facing a potential sentence of life imprisonment without parole for his role in the murder. The state argued that such cross-examination of the accomplice would "educate the jury as to the non-existence of parole eligibility." JA 20-21. After some discussion, the defense agreed not to question the witness about the unavailability of parole, and ultimately waived cross-examination altogether. JA 23.

C. The sentencing hearing

The jury convicted appellant of murder, attempted armed robbery and conspiracy. At the capital sentencing hearing that followed, the prosecution followed through on its pretrial notice that it would present evidence "as to the Defendant's . . . propensity to commit . . . acts of bodily harm as an adult and a juvenile." The future dangerousness evidence consisted of testimony by law enforcement and jail personnel concerning petitioner's criminal record and his allegedly defiant and assaultive behavior in pretrial detention. Through these witnesses, the state sought to establish the following facts:

- at age 17, petitioner was convicted of burglary and criminal sexual conduct, after he and some friends confessed to having sex with two 12-year-old girls in an unoccupied house, JA 32-37;

- after receiving a probationary sentence for his burglary and criminal sexual conduct convictions and being assigned to an "intensive" probation agent responsible for handling "clients of high risk," JA 71, petitioner violated probation by being rearrested for burglary and driving under suspension, by twice testing positive for marijuana, and by failing to report both to his probation officer and for court-ordered sex offender counseling, JA 72-73, 78-79;

- while awaiting trial for capital murder, petitioner was charged with assaulting a female staff member at the county jail after he became enraged and verbally abusive because she had terminated the inmates' telephone calls, JA 54-58;

- petitioner was also charged with possession of contraband in the jail for illegally possessing and smoking cigarettes, JA 66-68;

- that on the night of his arrest, petitioner asked a jailer whether his father would get his pistol back after it had been seized as the murder weapon, JA 89-90; and
- that petitioner acted like the murder "didn't even bother him" when discussing it with a fellow jail inmate shortly after his arrest. JA 81-85.

Petitioner's mitigation evidence consisted primarily of testimony concerning the physical and emotional abuse he had suffered as a small child and as an adolescent. R. 1578-81, 1584-95, 1598-99. He also introduced expert psychological testimony to the effect that the unrelenting mental and physical abuse he endured over the course of his childhood had left him traumatized, chronically depressed, and at risk for drug abuse and explosive outbursts of aggression. JA 99-107, R. 1711.

At a charge conference near the end of the defense case in mitigation, the prosecutor argued that petitioner was not entitled to a *Simmons* instruction on parole ineligibility because, as in *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994), the prosecution had not "made future dangerousness an issue in this case." JA 160-61. The prosecutor further requested, for the same reason, that the judge "prevent the defense from arguing in their closing argument anything to the effect that he will never get out of prison or anything of this order." R. 1818. Defense counsel protested that the prosecution had already presented evidence of petitioner's assaultive and lawless behavior in jail after his arrest, and urged that the prosecution should not be permitted to evade the *Simmons* rule merely by omitting future dangerousness from its jury

argument after introducing evidence of future dangerousness in its case-in-chief. JA 161-62. In response, the prosecutor insisted that the state's evidence relating to petitioner's assault on a jail guard was not evidence of his future dangerousness:

> Your Honor, he was charged with simple assault, not assault and battery. And, second, we put that in for two reasons, to show his character and to show his adaptability to prison, not future dangerousness. Nobody has argued future dangerousness or said that he might do this again in the future, and the state doesn't intend to in its closing argument.

JA 162-63. After further discussion, the trial judge ruled that the state had not yet "argued" future dangerousness as a sentencing consideration, and unless it did so, he would not charge the jury concerning petitioner's parole ineligibility. JA 164.

Defense counsel next requested that he be permitted to read the relevant portion of S.C. Code Ann. § 16-3-20(A) to the jury. JA 164-65. That code section provides:

> If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt . . . and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. *No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct*

> *credits, or any other credits that would reduce the mandatory life imprisonment required by this section.*

(emphasis added). With the state's consent, the trial court eventually agreed to charge that portion of the statute providing that " 'life imprisonment' means until death of the offender." JA 166-69. However, the court denied defense counsel's request that he be permitted to read the last sentence of the above-quoted section of Code § 16-3-20(A) to the jury in the course of argument in order to make clear that "life imprisonment" also excluded all possibility of parole. JA 164-65.

Having thus ensured that the jury would not be "educate[d] as to the non-existence of parole eligibility," JA 21, the prosecutor ended his closing argument with a dramatic evocation of the murder scene which wove together his belief in the alleged deterrent value of capital punishment with the witnesses' expressed fear, after discovering the dying victim, that the killers "might come back." The prosecutor stated:

> Ladies and gentlemen, one of the scariest things . . . about . . . the video where we saw the cash tape, the horror and all of the sound, do you remember the girls that came in and when Jamie Palmer was saying, "Oh God; oh, God; oh, God, Ray," and the girls were running in and out, we've got to go, we've got to go, and I tell you what, I've listened to it, you've listened to it, and you will have a chance again, but what is really etched in my mind is Monica Inman. Remember Jamie picks up that phone and she's calling 911, and Monica Inman says, "Come on,

> Jamie, *they might come back, they might come back.*"
>
> Ladies and gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the state. So the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, *and they might come back, they might come back,* they will remember this day, and they will remember this jury, and they will remember this verdict.

JA 185-86 (emphasis added).

At the conclusion of the argument, defense counsel renewed petitioner's request for a *Simmons* no-parole instruction on the grounds that the prosecutor's dramatic and repeated evocation of the witnesses' fear that the murderers "might come back" had again raised the issue of petitioner's future dangerousness. JA 188-92. The prosecutor continued to deny having suggested that petitioner would be dangerous in the future, insisting that his argument was intended only to urge the general deterrent effect of a death sentence in this case on other would-be murderers. The trial judge denied petitioner's renewed request for a *Simmons* instruction, stating that the prosecutor's jury argument "comes close" to a future-dangerousness claim, but that it had not "crossed the line." JA 191-92.

In keeping with this ruling, neither defense counsel nor the trial judge ever informed the jury at any point in the proceedings that South Carolina law prohibits parole or other form of early release for a defendant who has

been sentenced to life imprisonment for murder. Defense counsel did make rhetorical assertions that petitioner would "die in prison," JA 192, 198, and that he would be put in prison "until he is dead." JA 194. Likewise, the judge's instructions to the jury included the statutory provision that "life imprisonment means incarceration of the defendant until his death." JA 209. However, after three-and-a-half hours of deliberation, the jury sent out two written questions that showed it had not interpreted defense counsel's arguments and the court's "incarceration until death" instruction as necessarily precluding the possibility of parole:

> 1. Is there any remote chance for someone convicted of murder to be eligable [sic] for parole?
>
> 2. Under what conditions would someone convicted for murder be eligable [sic]?

JA 222, 253. There followed more than forty-five minutes of discussion between the court and counsel while the jury waited for an answer to its questions. JA 222-242. The state continued to insist that the jury should not be informed of the unavailability of parole because "future dangerousness has not been argued as an issue." JA 223. Petitioner's counsel renewed his earlier request that the court read to the jury those portions of S.C. Code Ann. § 16-3-20(A) immediately preceding and following the single sentence already charged. JA 226. The court denied petitioner's request and eventually decided to re-instruct the jury that under S.C. Code Ann. § 16-3-20 "life imprisonment means until the death of the offender." JA 229. At this juncture the prosecutor read to the judge the holding of a pre-*Simmons* decision of the South Carolina

Supreme Court, *State v. Norris*, 328 S.E.2d 339, 344 (S.C. 1985), to the effect that " '[w]hen the issue [of parole] is raised, the judge should instruct the jury that it shall not consider parole eligibility in reaching its decision, and that the terms "life imprisonment" and "death sentence" should be understood in their plain and ordinary meaning.' " JA 234. The trial judge acknowledged that the applicability of *Norris* was complicated by the intervening amendments to South Carolina's capital sentencing statute, but that earlier decisions such as *Norris* "are all I've got to go on." JA 236. Ultimately, the judge acceded to the state's request to include a further instruction to the jury that "parole eligibility is not for your consideration." JA 236. Defense counsel urged the judge to delete the explicit reference to parole eligibility, pointing out that it implied parole *was* a possibility, when in fact it was not. JA 236, 239. However, the trial judge adhered to his ruling, and after nearly an hour's wait, the jury was summoned back into the courtroom and re-instructed as follows:

> Now, your questions were two. First, "Is there any remote chance for someone convicted of murder to be eligible for parole?" And the second is, "Under what conditions would someone convicted for murder be eligible?"
>
> I answer that in this fashion. Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge.
>
> Section 16-3-20 of our Code of Laws as applies to this case in the process we're in, states that, "for the purposes of this section life

imprisonment means until the death of the offender."

Parole eligibility or ineligibility is not for your consideration.

JA 239-40.

An hour and twenty minutes after receiving this instruction, the jury returned with a death sentence. JA 241-43. When the jury's sentencing decision was announced, defense counsel requested, in light of the jury's parole questions, that the court poll the jury on "the specific question whether parole eligibility, their belief therein, gave rise to their verdict." JA 248. Counsel also requested the court to make an inquiry of a member of the trial jury who had indicated during jury selection that she worked for the parole board, R. 389, to determine whether she had "expressed personal knowledge outside of the evidence and the law given." JA 248. The trial judge denied both requests, dismissed the jury, and sentenced petitioner to death. JA 248-54.

D. How the state supreme court decided the *Simmons* issue.

On direct appeal to the South Carolina Supreme Court, petitioner renewed his argument that the federal due process rule of *Simmons v. South Carolina* entitled him to advise the jury of the unavailability of parole had he been sentenced to life imprisonment. *State v. Shafer*, Brief of Appellant at 24-30; Reply Brief at 4-16. In response, the state advanced a wholly new justification for the trial judge's refusal to give a *Simmons* instruction. Pointing out that under South Carolina's amended sentencing statute,

the trial judge can impose a less-than-life sentence for murder if the jury finds no statutory aggravating circumstance, the state insisted that the South Carolina statute no longer satisfies the first, "life-without-parole" requirement of *Simmons*. As a result, according to the state, *Simmons* no longer applied to *any* South Carolina capital proceeding conducted under the post-1995 statute. *State v. Shafer*, Brief of Respondent at 21-29.[3]

With one justice dissenting, the South Carolina Supreme Court agreed with this argument, and on that basis upheld the trial judge's refusal to give a *Simmons* instruction. In petitioner's case and in a companion case decided the same day, *State v. Starnes*, 531 S.E.2d 907, 915-17 (S.C. 2000), the state supreme court held *Simmons* to be inapplicable to post-1995 South Carolina capital cases "because life imprisonment is not the only legally available sentence alternative to death." *State v. Shafer*, 531 S.E.2d 524, 528 (S.C. 2000), JA 260. In its *Starnes* opinion, to which the *Shafer* opinion referred, the state court quoted at length from the amended S.C. Code Ann. § 16-3-20, emphasizing those provisions that authorize sentences of as little as thirty years if (and only if) "no aggravating circumstance is found." *Starnes, supra*, 531 S.E.2d at 916. The court did not, however, include or refer to the next section, § 16-3-20(C), which provides in relevant part:

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[3] The state did acknowledge that a *Simmons* instruction might still be required where the prosecution had exercised its discretion to invoke a recidivist statute that mandates life sentences for certain second or third felony convictions. *State v. Shafer*, Brief of Respondent at 29 (citing S.C. Code Ann. § 17-25-45 (Supp. 1999)).

> Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A) . . . If the jury does not unanimously find any statutory aggravating circumstance or circumstances beyond a reasonable doubt, *it shall not make a sentencing recommendation.*

(emphasis added). To petitioner's argument that under the portion of § 16-3-20(C) quoted above, a South Carolina jury does not even deliberate on the issue of sentence unless and until it has found an aggravating circumstance – at which point the only alternatives are indeed death and life without parole – the state supreme court responded:

> Appellant argues *Simmons* mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read *Simmons* so narrowly. By its own terms, *Simmons* requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to the defendant. *Simmons*, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole . . . ".) (emphasis added).

JA 260-61. Because a sentence of as little as thirty years could be imposed in cases where the jury failed to find

the defendant death-eligible and thereby passed sentencing responsibility to the judge, the state court majority held *Simmons* inapplicable to the amended South Carolina sentencing scheme. In support of this holding, the court cited a series of state and federal cases holding *Simmons* inapplicable where, if the jury declined to impose the death penalty, the defendant would have been eligible either for parole, *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999); *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994); *State v. McLaughlin*, 462 S.E.2d 1 (N.C. 1995), or for a less-than-life sentence to be selected by the court. *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995); *People v. Simpson*, 665 N.E.2d 1228 (Ill. 1996). JA 260-62.

On June 6, 2000, the South Carolina Supreme Court stayed petitioner's execution to allow the filing of a petition for writ of certiorari in this Court. JA 279-80. On September 26, the Court granted the petition, limited to the question of whether the denial of an instruction on life without parole violated due process and *Simmons v. South Carolina*. JA 281.

SUMMARY OF THE ARGUMENT

1. The South Carolina Supreme Court's declaration that *Simmons v. South Carolina*, 512 U.S. 154 (1994), no longer applies to South Carolina's capital sentencing statute is directly contrary to this Court's recent decision in *Ramdass v. Angelone*, 120 S. Ct. 2113 (2000), and to *Simmons* itself. The fact that South Carolina trial judges now have the power to impose a sentence of less than life

without parole if the jury does not find a statutory aggravating circumstance is irrelevant for two reasons. First, any South Carolina jury with the legal authority to impose the death penalty can also impose a life-without-parole sentence (and no other). And second, a jury that cannot impose the death penalty for lack of a statutory aggravating factor may also not impose – or even consider – any other sentence. Regardless of the availability of lesser sentences for non-death-eligible defendants, it remains just as true under the current South Carolina sentencing scheme as it was in *Simmons* itself that "as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Ramdass, supra,* at 2121 (plurality opinion).

2. The state's evidence and jury argument placed petitioner's future dangerousness at issue, and entitled him to the protection of the *Simmons* rule. The evidence bearing on future dangerousness included the facts of the crime itself, petitioner's prior criminal record, his poor performance as a "high-risk" probationer, his apparent lack of remorse for the murder, and his violent and impulsive misbehavior in jail. Prior to trial, the state forthrightly characterized much of this case in aggravation as "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm." JA 6. It later relabeled this same evidence as concerned with petitioner's "character," rather than to his "dangerousness," but this semantic change was merely a transparent effort to avoid a *Simmons* instruction. The state's introduction of detailed evidence concerning petitioner's violations of probation was especially likely to raise the specter of parole release, and the prosecutor's

repeated evocation of witnesses' frightened cries that the killers "might come back" was calculated to underscore the danger that petitioner still posed. South Carolina law and the trial court's instructions both permitted the jury to draw adverse inferences about petitioner's future dangerousness from all of this evidence and argument, and the jury's parole questions strongly imply that the jury did just that. Under these circumstances, there is no merit to the state's claim that future dangerousness was not at issue at petitioner's sentencing hearing merely because the prosecutor was careful to avoid the word "dangerousness."

ARGUMENT

A. South Carolina's declaration that *Simmons v. South Carolina* no longer protects capital defendants in that state is flatly inconsistent with *Simmons*.

At the time of the South Carolina Supreme Court's decision in this case, South Carolina was one of only two life-without-parole jurisdictions that still refused to inform capital sentencing juries of the non-existence of parole except to the extent required by *Simmons*. *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994) (*Simmons* instruction not required because state did not rely on future dangerousness), *vacated on other grounds*, 524 S.E.2d 833 (S.C. 1999); *Commonwealth v. Clark* 710 A.2d 31, 35-37 (Pa. 1998) (same). *But see Yarbrough v. Commonwealth*, 519 S.E.2d 602 (Va. 1999) (requiring no-parole instructions

even where future dangerousness not at issue); *Commonwealth v. Clark*, *supra*, 710 A.2d at 43-44 (three members of seven-member Pennsylvania Supreme Court would mandate *Simmons* instructions in all cases).[4] With its decision here, South Carolina has attempted to extend this refusal beyond what *Simmons* and due process permit.

The South Carolina Supreme Court's error in this case is plain. The state court overlooked the fact that if the jury fails to find any statutory aggravating circumstance, S.C. Code Ann. § 16-3-20(C) provides that the jury "shall not make a sentencing recommendation" at all, in which case the selection of a noncapital sentence becomes the sole province of the trial judge. Under the current South Carolina sentencing scheme – and under the jury's instructions in this case – the jury does not even engage in sentencing deliberations unless and until it has established the defendant's death-eligibility by finding at least one statutory aggravating circumstance. And once that threshold is crossed, it is undeniably true, as the trial judge explained to petitioner's jury, that two and only two possible sentences exist: death and life imprisonment.[5] What petitioner's jury did *not* know, even after

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[4] The law of the nation's capital sentencing jurisdictions governing whether and how trial judges should inform capital sentencing juries of restrictions on parole release is set forth *infra* at App. 9-12.

[5] The trial judge told the jury, "There are two recommendations that you are to consider in this case. One is the death penalty, the other is life imprisonment." App. 199. "Once you have unanimously found . . . an aggravated [sic] circumstance, you then further deliberate, and determine whether or not Wesley Aaron Shafer should be sentence[d] to life imprisonment or death." App. 202. *See also* App. 212-14.

inquiring about the subject, was that "life imprisonment" means life imprisonment without possibility of parole. Instead, just as in *Simmons*, the trial judge "actually suggested that parole was available but that the jury, for some unstated reason, should be blind to this fact." *Id.*, 512 U.S. at 170 (plurality opinion).

United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), on which the state supreme court relied, is inapposite. *Flores* involved a federal murder statute, 21 U.S.C. § 848(e), which provides for sentences ranging from twenty years to death. The jury's only sentencing function under § 848 is to decide whether or not to impose the death penalty: if it does not, the judge selects a non-capital sentence. 21 U.S.C. § 848(k). While the facts of *Flores* made any less-than-life sentence highly unlikely, federal law did not *preclude* such a sentence: consequently, the Fifth Circuit determined that *Simmons* did not apply. *See* 63 F.3d at 1368; *accord Ramdass v. Angelone*, 120 S. Ct. 2113 (2000). In contrast, South Carolina's sentencing system requires the jury to choose *between* life and death, and it *does* preclude any sentence less than life without parole once the jury's finding of death-eligibility triggers its sentencing role. Because state law provides no alternative but life without parole for any jury that actually considers whether to sentence a defendant to death, the *Simmons* requirement of a life-without-parole alternative to the death penalty is now satisfied in *every* South Carolina capital case, including this one.

If *Simmons* itself could have left any doubt on this point, *Ramdass v. Angelone* removes it. In *Ramdass*, decided just after the South Carolina Supreme Court's decisions in *Shafer* and *Starnes*, Justice Kennedy explained for a four-

member plurality of the Court that "[t]he premise of the *Simmons* case was that, under South Carolina law, the capital defendant would be ineligible for parole if the jury were to vote for a life sentence." 120 S. Ct. at 2119. Later, Justice Kennedy elaborated on this point, observing that under *Simmons*, a "parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law." *Id.* at 2120. And finally, Justice Kennedy's plurality opinion stressed that "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* at 2121.

These descriptions of the scope of *Simmons* clearly encompass the amended South Carolina statute under which petitioner was sentenced. Petitioner's jury was given a life-imprisonment alternative and was required (after finding an aggravating factor) to impose either life or death. The fact that the trial judge might have imposed a lesser sentence if the jury did *not* find a statutory aggravating circumstance is irrelevant, both because any South Carolina jury with the legal authority to impose the death penalty can also impose a life-without-parole sentence (and no other sentence), and because a jury that cannot impose the death penalty for lack of a statutory aggravating factor may also not impose – or even consider – any other sentence. Thus what was true in *Simmons* is just as true here – the only non-capital sentence available to the *sentencing* jury was life without parole.[6]

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[6] Moreover, even if a less-than-life option were available to the sentencing jury, *Simmons* would still apply. As the above-quoted statements from Justice Kennedy's *Ramdass* opinion make clear, the relevant question is *whether state law permits the jury to impose life without parole* upon an allegedly dangerous capital murderer. It does not matter whether a state makes such a sentence the *only* non-capital alternative for a death-eligible defendant (as South Carolina does), so long as life without parole is *one of* the options that the sentencing jury may select. If it is, the due process rationale of *Simmons* applies with undiminished force, and bars the state from concealing from the sentencing jury its life-without-parole alternative.

B. The prosecution placed petitioner's future dangerousness in issue.

The South Carolina Supreme Court did not address the state's alternative rationale for denying a *Simmons* instruction, i.e., that the prosecution did not "argue" future dangerousness as a nonstatutory aggravating factor. Since the state renewed this argument as an alternative reason to deny certiorari, *Shafer v. South Carolina*, Brief in Opposition to Petition for Writ of Certiorari at 29-33, and will likely do so again in its brief in this Court, petitioner will address it here.

As is often the case, the state's evidence bearing on future dangerousness centered on the facts of the crime itself, petitioner's prior criminal record, his violations of probation and his misbehavior in confinement. Before trial (and apparently before considering the *Simmons* implications of its evidence), the state forthrightly characterized much of its case in aggravation as "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm." JA 6. The state later re-characterized this evidence as relating to petitioner's "character" rather than to his "dangerousness" in

a transparent effort to avoid a *Simmons* instruction. But the evidence itself remained the same. Thus the state introduced petitioner's prior record for burglary and criminal sexual conduct, his failure as a "high-risk" probationer, and testimony that he had threatened and assaulted a female jail employee while awaiting trial.

While this evidence was arguably relevant to more than one issue, future dangerousness was undeniably *one* of the issues suggested by evidence that petitioner committed sexual crimes against a 12-year-old-girl, and that he was prone to angry and impulsive outbursts of aggressive behavior. *See California v. Ramos*, 463 U.S. 992, 1006 n.20 (1983) ("[A] . . . jury's evaluation of the defendant's future dangerousness may rest on lay testimony about the defendant's character and background and the inferences to be drawn therefrom."). After considering petitioner's prior criminal record, his poor record on probation, his angry assault on a jail officer, and the extreme impulsiveness revealed by the videotape of the murder itself, the jury likely found itself wondering (and discussing) whether the risks of allowing petitioner to live were unacceptably great. Would he prove similarly impulsive and angry in the future? Would he strike again, whether in prison or, if released, in society? And the fact that the jury found it necessary to ask the judge whether petitioner would ever be eligible for parole further indicates that the jurors did indeed interpret this evidence as tending to show his future dangerousness. *See California v. Ramos*, 463 U.S. 992, 1003 (1983) (noting that an instruction inviting the jury to consider the possibility of a capital defendant's eventual release on parole "focuses

the jury on the defendant's probable future dangerousness"); *Commonwealth v. Trivigno*, 750 A.2d 243, 254 (Pa. 2000) (jury's questions about parole and consecutive sentencing show that future dangerousness was a factor in deliberations). Given the evidence, the prosecutor's argument, and the jury's parole questions, petitioner's future behavior and his potential for future dangerousness were plainly among the factors weighed by the jury as it deliberated life and death.

The state may contend that the evidence of petitioner's assaultive misconduct in jail went only to the issue of his likely behavior *in confinement*, and thus did not entitle him to a no-parole instruction. This argument not only applies to only a small part of the state's future dangerousness case, but is without merit even as far as it goes. The fact that a murderer is violent and assaultive in pretrial confinement may indeed suggest that his future prison behavior will be bad, but it also implies that he will be dangerous anywhere, inside prison or out, unless executed. Indeed, a pretrial detainee's violent behavior within the restrictive setting of a county jail provides an especially powerful reason to expect even more violent behavior should he ever be released into society. The jail evidence introduced in this case tended to prove petitioner's future dangerousness both in prison and outside it, and the jury was reasonably likely to draw both inferences.

More broadly, the state may claim that its evidence in aggravation concerned only petitioner's "character" rather than his likely future behavior. Although the South Carolina Supreme Court has distinguished between bad character and dangerousness in prior cases, *see, e.g., State*

v. Young, 459 S.E.2d 84, 87 n.4 (S.C. 1994), in this case such a distinction is meaningless. When the prosecution seeks to prove that a convicted murderer has a bad prior record, cannot be rehabilitated, lacks remorse, and behaves violently in jail, it is trying to prove that his character is one of persistent and violent criminality – which is to say, that he is dangerous and will remain so. The defendant's right to inform the jury that he will never be released from prison does not depend on whether this portrayal is labeled "dangerousness" or "character," because in this setting the two terms mean the same thing.[7]

In states where dangerousness is a formal statutory factor, prosecutors generally rely on precisely the type of evidence that the state introduced here. Courts in both Virginia and Texas – states where future dangerousness is

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[7] South Carolina's proffered distinction between a convicted murderer's bad character and his future dangerousness recalls an analogous claim that this Court rejected in *Skipper v. South Carolina*, 476 U.S. 1 (1986). There, the South Carolina attorney general insisted that state law permitted capital defendants to offer mitigating evidence of their past good conduct in prison, while barring only "irrelevant" evidence of their future adaptability to prison life. The Court found "[t]he State's proposed distinction between use of evidence of past good conduct to prove good character and use of the same evidence to establish future good conduct in prison . . . [to be] elusive . . . [because] a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7. In much the same way, evidence of a defendant's explosively violent and remorseless character "is by its very nature" evidence of his future dangerousness.

a statutory factor – have held that the facts of the capital murder itself may alone support a finding of dangerousness beyond a reasonable doubt. *See, e.g., Pope v. Commonwealth*, 360 S.E.2d 352, 361 (Va. 1987), *Bell v. State*, 938 S.W.2d 35, 42 (Tex. Crim. App. 1996). In addition, given that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing," *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986), prosecutors usually present any available evidence of prior convictions and other violent or anti-social conduct to prove future dangerousness. *See e.g., Johnson v. Texas*, 509 U.S. 350, 355 (1993) (state proved future dangerousness by introducing 19-year-old offender's prior crimes); *State v. Tucker*, 478 S.E.2d 260, 269-70 (S.C. 1996) (recognizing that evidence of past criminal behavior is highly relevant to both character and future dangerousness of convicted murderer). Likewise, in this Court's most recent decision involving the scope of the *Simmons* rule, the plurality noted that "[t]o demonstrate Ramdass' evil character and his propensity to commit violent acts in the future, the prosecutor used Ramdass' prior criminal conduct, supported in some cases . . . by evidence in the form of resulting jury verdicts." *Ramdass*, 120 S. Ct. at 2122. The prosecution in petitioner's case did exactly the same thing, omitting only the phrase "future dangerousness" to characterize its future dangerousness case.

The state's emphasis on petitioner's poor record as a "high-risk" probationer following his earlier felony convictions for criminal sexual conduct and burglary was particularly likely to inject both future dangerousness and parole into the jury's deliberations. The state offered

evidence of petitioner's failure to comply with the rehabilitative conditions of his probationary sentence to show that he did not learn from his mistakes. Such lack of rehabilitative potential was obviously relevant to whether this convicted murderer would likely prove violent in the future. *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (listing defendant's prior narcotics conviction and "failure to attempt to rehabilitate himself" as factors supporting a future dangerousness finding). Moreover, the presentation of detailed evidence about petitioner's previous probationary sentence was likely to raise in the jurors' minds the question of whether he might again be allowed to serve part of his sentence outside of prison. While the difference between probation and parole may be clear enough to lawyers, there is no reason to think that it is equally clear to jurors. The state's injection of probation into petitioner's sentencing hearing was much more likely to raise the issue of future release than anything that the prosecution did or said in *Simmons* itself. It also made it all the more probable that the jury would focus its attention on petitioner's likely behavior if released from prison.

Because South Carolina is a "non-weighing" jurisdiction, petitioner's jury was not required to indicate whether it had drawn any conclusions about his future behavior from the evidence of his past behavior. But the jury's instructions clearly authorized it to draw such conclusions. *See e.g.* R. 1924-25 (court instructs that jury may consider petitioner's prior offenses "as evidence of his character, his characteristics . . . and you may give them whatever weight you deem proper . . . "). And the jury's parole questions strongly suggest that it did.

To be sure, the prosecutor avoided using the term "dangerousness" in his closing argument, presumably because he knew that under *Simmons* too explicit a discussion of dangerousness would doom his efforts to keep the jury in the dark about petitioner's ineligibility for release. But even this semantic restraint all but disappeared when the prosecutor dramatically and repeatedly recalled a witness's videotaped warnings after the shootings that the killers "might come back." Just as in *Simmons* itself, this argument powerfully evoked the jury's fear of future depredations by a killer who has been loosed upon society.

Of course, "they might come back" was a coded rhetorical device rather than a literal description of the danger that petitioner posed in the future. But so was the prosecutor's dangerousness argument in *Simmons*. In that case the prosecutor never used the terms "dangerous" or "dangerousness," nor did he offer any prediction of what the defendant would do in the future if not executed. The sum total of the *Simmons* prosecution's injection of future dangerousness, as summarized both by the plurality and by Justice O'Connor's concurrence, was as follows:

> The question for the jury, the prosecution argued, was "what to do with [petitioner] now that he is in our midst." The prosecution further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense."

512 U.S. at 157, 177. These veiled references to Simmons' dangerousness were just that: *veiled* references. Indeed, two dissenting Justices detected nothing at all in the prosecutor's argument that even referred to Simmons'

future behavior: to the dissenters, the "in-our-midst" passage referred only to Simmons' alleged attempt to blame his crimes on his childhood environment, while the "self-defense" reference was merely an appeal for a calm and dispassionate societal response to Simmons' brutal crimes, rather than a sentence based on anger or emotion. 512 U.S. at 181-82 (Scalia, J., dissenting).

In this case, the prosecutor's haunting evocation of the witnesses' terrified cries that the killers "might come back" was at least as pointed a reference to the defendant's future dangerousness as anything in *Simmons*. Just as in *Simmons*, that argument entitled petitioner to inform the jury that he would not be "coming back" even if the jury spared his life, because under South Carolina law he would never be released from prison if the jury imposed the only non-capital sentencing alternative available to it. And petitioner's right to so inform the jury was all the greater in light of the state's evidence that preceded it – evidence calculated to convince the jury of petitioner's dangerous impulsivity, his imperviousness to rehabilitation while on probation, his anger, and his lack of remorse.

Whether a given question is "in issue" before a jury depends not on the exact phraseology of the parties' closing arguments, but on the evidence presented and the legal framework within which the jury must come to judgment. In this case, the jury was certainly *authorized* to consider 19-year-old Wesley Shafer's likely future dangerousness as a reason to sentence him to death. *See e.g. State v. Woomer*, 299 S.E.2d 317, 319-20 (S.C. 1982). The state did everything it could, short of using the word "dangerousness," to encourage such consideration.

Indeed, if future dangerousness had not been sufficiently "in issue" to trigger the due process protection of *Simmons*, petitioner would presumably have been entitled to an instruction directing the jury not to consider or even discuss the question of his likely future conduct as a reason to sentence him to death.[8] But any attempt to craft an instruction differentiating the *evidence* of petitioner's dangerousness (i.e. his "characteristics" as revealed by his conduct) from the *issue* of his dangerousness would be futile. In this case, dangerousness simply could not have been artificially excluded from the jurors' minds. The evidence and the prosecutor's argument put the issue squarely before them. Moreover, in a non-weighing jurisdiction such as South Carolina, no rule of law limits the jury's reasons for imposing the death penalty on a death-eligible defendant, nor requires the jury to perform the mental gymnastics necessary to segregate the issue of dangerousness from the overlapping issue of character.

In *Simmons*, dangerousness was raised in part (as it was here) by a veiled prosecution argument. But nothing in *Simmons* suggests that *only* the prosecutor's jury argument can inject the issue of dangerousness into a jury's

---

[8] In yet another *Simmons* case now pending on direct appeal in the South Carolina Supreme Court, the defendant requested just such an instruction after the state prevailed on the trial judge to deny a no-parole instruction under *Simmons* on the grounds that the state did not intend to "argue" the defendant's future dangerousness. *State v. William Arthur Kelly*, Record on Appeal at 2108 (Docket No. 200066, S.C. Sup. Ct.) The trial court refused to give the requested limiting instruction, and, as in this case, placed no limitations on the adverse inferences that the jury was authorized to draw from the state's evidence in aggravation.

sentencing deliberations. Indeed, common sense dictates otherwise. The unstructured manner in which juries consider future dangerousness in non-weighing jurisdictions such as South Carolina shows the importance of enforcing the rule in *Simmons* on the basis of the evidence and instructions that guide the sentencing jury to its life-and-death decision, not by the sort of devious rhetorical hair-splitting that the prosecution employed here.

In this case, both the prosecutor's argument and the state's evidence as a whole would logically and naturally have led the jury to consider the practical consequences – and potential dangers – of allowing petitioner to live. *Simmons* therefore entitled him to a fair hearing on that issue, which petitioner could receive only if the jury appreciated the full incapacitative effect of its life imprisonment option. The trial judge's refusal to answer the jury's mid-deliberation question about parole violated the due process rule of *Simmons* and mandates reversal of the death sentence imposed.

CONCLUSION

The judgment of the South Carolina Supreme Court should be reversed insofar as it leaves undisturbed petitioner's sentence of death.

Respectfully submitted,

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APPENDIX A

CODE OF LAWS OF SOUTH CAROLINA
1976 ANNOTATED
TITLE 16. CRIMES AND OFFENSES
CHAPTER 3. OFFENSES AGAINST THE PERSON
ARTICLE 1. HOMICIDE

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment

for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a-mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed

to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), § 44-53-375(B), § 44-53-440, or § 44-53-445;

(h) physical torture; or

(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory

aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person

called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

APPENDIX B

STATE LAW GOVERNING JURY INSTRUCTIONS ON PAROLE INELIGIBILITY IN CAPITAL CASES

I. At present, thirty states both employ juries in capital sentencing and provide for life imprisonment without possibility of parole as an alternative to the death penalty. In twenty-seven of these jurisdictions, the trial court expressly informs the jury of the defendant's ineligibility for parole, even where *Simmons* does not require such instructions as a matter of federal due process. A twenty-eighth state has not addressed the issue.

A. Thirteen states identify the jury's sentencing alternatives as death and life without parole.

Alabama: Ala. Code § 13A-5-46(e) (1994)

Arkansas: Ark. Code Ann. §5-4-603(b) (Michie 1997)

California: Cal. Penal Code Ann. § 190.3 (West 1999)

Connecticut: Conn. Gen. Stat. §§ 53a-46a(e)-(g) (Supp. 2000)

Delaware: Del. Code Ann. tit. 11, §4209(a) (1995)

Florida: *In re Standard Jury Instructions in Criminal Cases* No. 87922, 678 So.2d 1224 (Fla. 1996)

Louisiana: La.Code Crim. Proc. Ann., Art. 905.6 (West 1997)

Missouri: Mo. Rev. Stat. § 565.030.4 (1999)

New Jersey: N.J. Stat. Ann. § 2C:11-3(f) (West Supp. 2000)

New Hampshire: N.H. Rev. Stat. Ann. § 630:5 (1996)

New York: N.Y. Crim. Proc. Law § 400.27(10) (McKinney Supp. 2000)

South Dakota: *State v. Moeller,* 616 N.W.2d 424 (S.D. 2000)

Washington: Wash. Rev. Code § 10.95.030 (Supp. 2000).

B. Eleven states allow the jury to specify whether the defendant should or should not be eligible for parole.

Georgia: Ga. Code Ann. § 17-10-31.1(a) (1997)

Indiana: Ind. Code § 35-50-2-9 (1998)

Kentucky: Ky. Rev. Stat. Ann. § 532.025(3) (1999)

Maryland: Md. Ann. Code, Art. 27, § 413(c)(3) (Supp. 2000)

Mississippi: Miss. Code Ann. § 97-3-21 (2000)

Nevada: Nev. Rev. Stat. § 175.554(2)(c)(2) (1996)

Ohio: Ohio Rev. Code Ann. § 2929.03 (1999)

Oklahoma: Okla. Stat. Ann. tit. 21, § 701.10(A) (Supp. 2001)

Oregon: Or. Rev. Stat, § 163.105 (Supp. 1998)

Tennessee: Tenn. Code Ann. §§ 39-13-204(a)-(f)2 (Supp. 2000)

Utah: Utah Code Ann. § 76-3-207(4) (1999).

C. Two states require the sentencing jury be specifically instructed in all cases that the defendant will be ineligible for parole if sentenced to life imprisonment.

North Carolina: N.C. Gen. Stat. §15A-2002 (1999)

Virginia: Va. Code Ann. § 19.2-264.4 (Michie 2000)

D. One state requires the sentencing be instructed that the defendant will be ineligible for parole whenever such an instruction would be accurate under state law.

Illinois: People v. Gacho, 522 N.E.2d 1146, 1166 (Ill. 1988).

E. One life-without-parole state has not considered whether jurors should be instructed that the defendant is ineligible for parole under state law.

Wyoming: Wyo. Stat. §§ 6-2-101(b), 7-13-402(a) (1999)

F. Two life-without-parole states inform the jury of the defendant's ineligibility for parole only to the extent deemed necessary under *Simmons*.

Pennsylvania: *Commonwealth v. Chester,* 733 A.2d 1242 (Pa. 1999)

South Carolina: *State v. Southerland,* 524 S.E.2d 833 (S.C. 1999), *but see State v. Shafer,* 531 S.E.2d 524 (S.C. 2000) (holding *Simmons* inapplicable to cases tried under amended South Carolina sentencing scheme).

II. Two states which do not have life imprisonment without parole as an alternative to the death penalty nevertheless inform the jury as to the length of time the defendant must serve before becoming eligible for parole.

New Mexico: *Clark v. Tansy,* 882 P.2d 527 (N.M. 1994)

Texas: Tex. Crim. P.Code Ann. § 37.071 (West 1999)

III. In five states the capital sentencing decision is made by the trial judge alone or by a sentencing panel of judges.

Arizona: Ariz. Rev. Stat. Ann. § 13-702(B) (Supp. 1999)

Colorado: Colo. Rev. Stat. § 16-11-103(1)(a) (2000)

Idaho: Idaho Code § 19-2515(d) (Supp. 2000)

Montana: Mont. Code Ann. § 46-18-301 (1999)

Nebraska: Neb. Rev. Stat. § 29-2520 (1995).

DEC 13 2000

Supreme Court, U.S.
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No. 00-5250

In the
Supreme Court of the United States

WESLEY A. SHAFER, *PETITIONER*,

v.

SOUTH CAROLINA, *RESPONDENT*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR RESPONDENT

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59 pp

CAPITAL CASE

QUESTION PRESENTED

Whether *Simmons v. South Carolina*, 512 U.S. 154 (1994), entitled petitioner to a jury charge or closing argument that a life sentence would be without parole, when, at the time of his closing argument and the jury charge, under state law life without parole was not the only available alternative sentence to death?

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A. *Simmons v. South Carolina* and South Carolina's old sentencing scheme as compared to the sentencing scheme under which Petitioner was tried. 21

B. Triggering of the rule in *Simmons* requires that life without parole be the *only* available alternative sentence to death. 23

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D. Since it was impossible to predict at the time of the jury charge and closing argument that the jury would make the necessary findings to preclude the possibility of a definite term sentence, then life without parole was not the only available alternative sentence to death, and a *Simmons* instruction was not required. 27

E. *Simmons* does not require trial judges in South Carolina to gauge the probability of future events in determining whether life without

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CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina is reported as *State v. Shafer*, 531 S.E.2d 524 (S.C. 2000), and is reprinted in the Joint Appendix at 254-78. Also relevant is *State v. Starnes*, 531 S.E.2d 907 (2000). *Starnes* is the companion case to *Shafer* which decided the same issue pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994), and to which the *Shafer* opinion refers in addressing the *Simmons* issue.

JURISDICTION

The decision of the Supreme Court of South Carolina was entered on May 8th, 2000. This Court's jurisdiction is invoked by the Petitioner pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

1. The Fourteenth Amendment to the United States Constitution, which forbids, in pertinent part, the deprivation of "life, liberty, or property, without due process of law."

2. Section 16-3-20 of the Code of Laws of South Carolina, which is reprinted in the Appendix to the Brief of Petitioner App. 1 through App. 8.

RESPONDENT'S STATEMENT OF THE CASE

A. Procedural History

Petitioner, Wesley Aaron Shafer, Jr., is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Union County. In May 1997, the Union County Grand Jury indicted Petitioner Wesley Aaron Shafer for murder, attempted armed robbery and conspiracy. Specifically, the murder indictment alleged that, on April 13, 1997, Petitioner shot Ray Broome in the head with malice aforethought. The state made notice of intent to seek the death penalty, and served notice of evidence in aggravation.

Judge John C. Hayes conducted a jury trial in Union County beginning on January 12, 1998. On January 18, 1998, the trial jury convicted Petitioner of all charges.

The sentencing hearing began the next day. After presentation of the evidence, the trial judge charged the following statutory aggravating factor:

> A murder was committed while in the commission of an attempted armed robbery while armed with a deadly weapon.

The judge charged the following statutory mitigating circumstances:

> 1. The defendant has no significant history of a prior criminal conviction involving the use of violence against another person.

> 2. The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> 3. The capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirement of the law was substantially impaired.
>
> 4. The age and mentality of the defendant at the time of the crime.

The judge also instructed the jury that it could consider non-statutory mitigating circumstances supported by the evidence.

On January 21, 1998, the jury found the aggravating circumstance and recommended that Petitioner be sentenced to death for the murder. The trial judge imposed the death sentence the same day, along with consecutive sentences of twenty and five years for the attempted armed robbery and conspiracy charges respectively.

Petitioner timely filed notice of appeal. In the direct appeal to the South Carolina Supreme Court, Petitioner was represented by David I. Bruck, Esquire. Assistant Attorney General S. Creighton Waters, Esquire, represented Respondent. Both parties filed briefs in the appeal, and the following issues were presented by Petitioner:

> I. The trial court's incomplete and misleading response to the jury's question about parole eligibility renders his death sentence fundamentally unfair.

II. The trial court's refusal to allow Petitioner to present evidence to rebut the prosecution's argument concerning the supposed general deterrent effect of the death penalty, together with the denial of a curative instruction, denied Petitioner due process of law.

III. The trial court erred in granting the state's request for a blanket prohibition of all religious or biblical references during defense counsel's sentencing phase closing arguments.

The South Carolina Supreme Court heard oral argument on October 7th, 1999, and the court issued its opinion affirming Petitioner's conviction and sentence on May 8th, 2000. *State v. Shafer*, 531 S.E.2d 524 (S.C. 2000). On May 24th, 2000, Attorney Bruck filed on behalf of Petitioner a "Consent Motion for Stay of Execution". The South Carolina Supreme Court on June 6th, 2000 granted the motion for stay of execution but denied Petitioner's motion to stay the Remittitur. The Remittitur was sent down on June 6th, 2000.

Petitioner filed his Petition for Writ of Certiorari with the United States Supreme Court on July 14th, 2000, and this Petition was docketed on July 20th, 2000. This Court granted the Petition for Writ of Certiorari on September 26th, 2000.

B. Statement of the Evidence Presented at Trial

Although the defense did argue against the presence of malice at trial, it is undisputed that Petitioner Wesley Shafer killed Ray Broome by shooting him twice in the head. The issues in this appeal only challenge the sentencing phase. The following briefly describes the evidence presented at trial.

Adam Mullinax, Shafer's cousin and a co-defendant, spent most of Saturday, April 12th, 1997, with Shafer and Justin Porter. R. 1161, 1154-1159. Mullinax testified that Shafer, who was wearing a Duke University jacket, showed off a pistol he kept in the jacket's outside pocket. R. 1159- 1161. At about 7 p.m., Mullinax left Porter and Shafer and went to watch boxing. R. 1159, 1162-1163.

Later that Saturday night, a number of teenagers and young adults were "cruising" in the parking lot at the Hot Spot convenience store, a popular late-night hangout in Lockhart, South Carolina. R. 990; 1017-1018; 1024-1025. Ray Broome, the victim, was the third shift clerk at the Hot Spot. R. 941. Around 11:30 p.m., two men in a brown late-70's Ford pickup attracted attention by spinning the truck's wheels at the gas pumps. Jamie Gibson, who was hanging out at the Hot Spot, recognized Justin Porter as the driver. The passenger, who Gibson did not know, was wearing a Duke University hooded jacket. After Porter and his passenger went in the store, those hanging out at the Hot Spot saw the two men again spin the truck's wheels while leaving. As the truck pulled away from the store, the passenger held his arm out of the window and fired several shots into the air with a handgun. R. 962, 990-996, 1011-1013, 1020, 1025-1026, 1039-1040, 1045, 1047-1048.

At about midnight, Mullinax again met up with Porter and Shafer, and after the three drank a few beers, they decided to go to the Hot Spot for cigarettes. Upon arrival, Mullinax used the restroom in the store and returned outside to the Ford pickup. Shafer then pulled the hood on his head, and he and Porter entered the store around at about 1:00 a.m. R. 996-1000, 1013; 1162-1168.

What happened next was entirely captured on a video recorders hooked to the Hot Spot's security cameras. The

videotape introduced at trial reflects Shafer walk in and shoot Broome in the head with a startling lack of warning. Eight seconds later, Shafer strolled over to the counter, leaned over it, and at close range put another bullet into Broome's head as he lay on the floor. After attempting and failing to open the cash register, Shafer and Porter ran out the door. JA 14; R. 963-965, 1168-1170.

Once back at the truck, Shafer jumped in the middle of the seat and ducked his head down on Mullinax's lap. While standing at the truck's door, Porter pulled a hat onto his head, fumbled around looking for the keys, and then started the truck and drove away. R. 1028-1031, 1041-1043, 1048, 1170-1171.

Meanwhile, Jamie Palmer, Monica Inman, and Jennifer Martin had pulled into the Hot Spot parking lot in time to watch Shafer and Porter run to the truck and escape. Although her friends were apprehensive, Palmer went inside the Hot Spot and found Broome lying on the floor behind the counter. She promptly dialed 911. While she was on the phone, her friends came inside and begged her to leave, saying, "They might come back, they might come back." JA 14-15; R. 965, 1028-1032. Although Broome was still breathing when law enforcement and EMS arrived, emergency room personnel could not save him. R. 941-943, 975 -976, 1503-1506, 1507-1508, 1511.

After escaping from the Hot Spot, Shafer, Porter, and Mullinax returned to Porter's house. While Shafer was confident they would not be caught, he stated they need to get rid of their clothes. Shafer and Porter wrapped the murder weapon, which belonged to Shafer's father, in Mullinax's shirt and hid it under the seat in an old car behind the barn. The two then weighted Shafer's Duke University jacket with a rock, and put it into a nearby creek with their shirts and hats stuffed in the pockets. R. 1171-1174, 1108-110, 1130-1136.

The girlfriend of one of the responding deputies was the cousin of Porter, and she and Jamie Palmer had a conversation the night of the incident. R. 977-979. As a result of this conversation, the police drove Palmer and Inman by Porter's house Sunday morning. The young women identified the Ford pickup parked in Porter's yard as the one involved in the incident. R. 979 -980, 984-987, 1033-1037, 1053-1059.

The trail inevitably led to Shafer, and he was arrested that day. R. 1059-1073, 1079 -1102. After initially denying knowledge of the gun's whereabouts, Shafer ultimately told officers where it was hidden. He also directed them to the location of the hidden jacket and a box of bullets. R. 1104-1105, 1108-1110, 1118, 1121, 1124-1125. When asked by law enforcement why he shot Broome, Shafer replied that he had the gun and "just snapped." R. 1120, 1122, 1125-1126.

During the sentencing phase, the state introduced evidence that on October 9th, 1995, Shafer pled guilty to criminal sexual conduct with a minor 2nd and burglary 2nd. Shafer was part of a group of guys who broke into an empty mobile home and pressured, but did not force, two 12-year old girls to engage in sexual activity with them. Shafer did not always comply with the terms and conditions of his probation and home detention from that incident. JA 32-43. During that time he tested positive for marijuana, had another burglary 2nd charge, and was charged with driving under suspension and operating an uninsured vehicle. JA 70-73, 78.

While in jail awaiting trial, prison staff caught Shafer with contraband, including a green leafy substance as well as cigarettes and a lighter. JA 45-51, 65-70. Shafer also was charged with simple assault after he angrily confronted a prison guard who turned off the outside phones at the end of recreation period. JA 52-65.

Robert Newton, who was in county jail with Shafer, testified that when Shafer told him about shooting Broome he did not seem bothered by it. According to Newton, Shafer said that when Broome saw Shafer pointing the gun at him, he just looked back down at a clipboard. Shafer took this as a "smart comment", and fired the pistol. JA 81-85.

The state also presented testimony from various emergency personnel about the unsuccessful efforts to save Broome and the emotional ordeal of informing his family. R. 1502-1514. Broome's wife and son also testified about their loss. R. 1551-1576.

In mitigation, Shafer presented relatives and neighbors who generally testified about mental and physical abuse Shafer and his sister suffered at the hands of their father, Ricky. R. 1577-1609, 1650-1680, 1789-1808, 1850-1861. Dr. Patrick Goldsmith, a psychologist, testified about Shafer's alleged abuse, substance use, and resulting impulse control problems. He diagnosed Shafer with depression, and felt there was a "probability" he suffered post traumatic stress disorder in early childhood. JA 90-122.

Also testifying for Shafer was Lt. Col. David Grossman, who has a master's degree in psychology and who is the self-anointed founder of the discipline of "killology". Grossman theorized that years of abuse, watching violent movies, and playing violent video games had conditioned Shafer much in the "stimulus-response" manner which the military uses to train soldiers to kill the enemy. Thus, he generally asserted that Shafer had a "conditioned response" where if a "target" such as Ray Broome presented himself, it would be "extraordinarily difficult" for Shafer not to shoot. JA 123-158; R. 1681-1786.

In reply, the state presented testimony about one of the video games played by Shafer and discussed by Grossman. The witness stated that although a player got points by shooting bad guys, the player lost a life if he shot the "innocent townsfolk." R. 1865-1870.

C. Presentation and resolution of the federal issue at trial

At trial, the state sought an *in limine* motion that parole ineligibility could not be mentioned in either the charge or defense argument because the state had not triggered *Simmons v. South Carolina* by making future dangerousness an issue. *See, e.g. State v. Southerland*, 447 S.E.2d 862 (S.C. 1994) (holding that *Simmons* was not triggered because the solicitor did not argue future dangerousness). Defense counsel responded that the state could not use evidence about Petitioner's character and prior record without also raising future dangerousness. The court found that as of yet, future dangerousness had not been argued, so he granted the state's motion. JA 160-64.

Next, the defense expressed its generic desire for the court to charge South Carolina's murder statute, S.C. Code § 16-3-20, "as applicable." After the court indicated that it was charging what it thought was applicable from the murder statute, the defense made a motion to read from section 16-3-20. JA 164-65. The defense evidently wanted to read the following portion of section 16-3-20:

> For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits,

> education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.

JA 270. The court denied this motion. The state and the defense *both* agreed that the judge should charge the jury the portion of the statutory definition that life imprisonment means "until death of the offender." JA 166-69.

After the solicitor's sentencing phase closing argument, the defense argued that the solicitor raised future dangerousness when he echoed the statement of one of the witnesses who found the victim in trying to get her friend to leave, by saying "they might come back, they might come back." The solicitor stated he was merely arguing general deterrence, and the court agreed. JA 188-92.

The trial court then charged the jury as follows:

> THE COURT: I tell you that life imprisonment means until death of the defendant.
>
> * * *
>
> In deciding whether to sentence the defendant to death or life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death.

JA 201-09.

Finally, during deliberation the jury sent a note to the judge asking the following two questions:

> (1) Is there any remote chance for someone convicted of murder to become eligible for parole?
>
> (2) Under what conditions would someone convicted for murder be eligible?

JA 222, 253. The state again argued that under the *Simmons v. South Carolina* and its progeny, parole ineligibility does not need to be charged even if someone is parole ineligible, unless future dangerousness is argued. Thus, the state asserted that the court was bound by the state law rule in *State v. Norris*, 328 S.E.2d 339 (S.C. 1985). *Norris* provides that upon a jury's question about parole eligibility, the trial court should charge (1) that parole eligibility should not be considered, and (2) that death and life imprisonment should be considered in their plain and ordinary meaning. The state agreed to substituting "until death of the offender" for "plain and ordinary meaning" as the definition for life imprisonment. JA 222-28, 233-36.

In response, defense counsel admitted that the "until death of the offender" language was an appropriate "baseline," and stipulated that the second question could not be answered. The defense further contended that since section 16-3-20 explained that "life imprisonment" did not allow for parole or other early release programs, then the statute should be read to the jury. Asserting that under the present section 16-3-20 there are three clear options for the jury, the defense stated that it thought the jury should be charged that if they find an aggravator, Petitioner would receive life without parole. After the trial judge effectively ruled that it would charge *Norris*, Petitioner argued that the judge should not include "parole eligibility is not for your consideration" in its response to the jury's question. JA 224-26, 228-33, 234-39.

However, the judge ultimately charged the following:

> Section 16-3-20 of our Code of Laws as applies to this case in the process we're in, states that, quote, for the purposes of this section life imprisonment means until the death of the offender, end quote.
>
> Parole eligibility *or ineligibility* is not for your consideration.

JA 239-40 (emphasis added).

D. The South Carolina Supreme Court's resolution of the federal issue on direct appeal

On direct appeal, the South Carolina Supreme Court addressed the due process claim for a parole ineligibility charge as follows:

> Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends Simmons mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.
>
> When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. [*Simmons v. South Carolina*]; *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State

> "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society." *Simmons*, 512 U.S. at 165 (plurality opinion).
>
> Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp.1998). Under the new sentencing scheme, a defendant can be sentenced to (1) death, (2) life without the possibility of parole, or (3) a mandatory minimum thirty year sentence. We recently held *Simmons* is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. *State v. Starnes*, Op. No. 25[illegible]9 (S.C.Sup.Ct. filed May 8, 2000) (Shearouse Adv.Sh. No. 18 at 17). [FN7]
>
> [FN7] In *Starnes*, we suggested, under the terms of the statute, it is arguable that a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues *Simmons* mandates a charge on parole ineligibility when the State argues future dangerousness and the jury's sentencing recommendation is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read *Simmons* so narrowly. By its own terms, *Simmons* requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is legally available to the defendant. *Simmons*, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole...".) (emphasis added). This interpretation is supported by decisions from other jurisdictions. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir.1999) (*Simmons* is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); *United States v. Flores*, 63 F.3d 1342 (5th Cir.1995), *cert. denied*, 519 U.S. 825, 117 S.Ct. 87, 136 L.Ed.2d 43 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and, therefore *Simmons* is inapplicable);

Allridge v. Scott, 41 F.3d 213 (5th Cir.1994), *cert. denied*, 514 U.S. 1108, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995) (*Simmons* applies where capital defendant is ineligible for parole as a matter of law; *Simmons* does not apply even if it is unlikely defendant would be paroled); *People v. Simpson*, 172 Ill.2d 117, 216 Ill.Dec. 671, 665 N.E.2d 1228 (Ill.), *cert. denied*, 519 U.S. 982, 117 S.Ct. 436, 136 L.Ed.2d 334 (1996) (*Simmons* inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (N.C.1995), *cert. denied*, 516 U.S. 1133, 116 S.Ct. 956, 133 L.Ed.2d 879 (1996) (*Simmons* inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, *Simmons* was inapplicable. [FN8]

[FN8] The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death

or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting *Flores*, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In *Flores*, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in *State v. Starnes*, *supra*, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

State v. Shafer, 531 S.E.2d 524, 527-28 (S.C. 2000); JA 257-62.

Shafer also addressed Petitioner's state law bases for his claim that after the jury's question the trial court should have charged Petitioner was parole ineligible. *Shafer* first reiterated that absent a *Simmons* issue, a jury's inquiry about parole should be handled with the "plain and ordinary meaning" charge from *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985). *Shafer*, 531

S.E.2d at 531, JA 267-68. The court reiterated that Petitioner could possible receive one of three possible sentences at the time of sentencing, and recognized that the jury's question meant it "was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment". *Id.*, JA 269. Thus, the court concluded:

> Informing the jury that appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

Id., JA 269.

Next, *Shafer* rejected Petitioner's claim that parole eligibility was suggested by the judge's charge, "parole eligibility or ineligibility is not for your consideration". The court noted that unlike the charge in *Simmons*, this instruction "specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole eligible". *Shafer*, 531 S.E.2d at 532, JA 269.

Finally, *Shafer* disagreed with Petitioner's contention that the jury should be read the portions of section 16-3-20 which define life imprisonment as not subject to parole or early release programs, because: (1) parole eligibility or ineligibility were not proper considerations for the jury, and (2) "the highlighted text provides the jury with only those portions Petitioner deems favorable but excludes any reference to other less favorable sentencing options". *Shafer*, 531 S.E.2d at 532. JA 269-71.

In *State v. Starnes*, the companion case to *Shafer*, the court discussed with more detail its rejection of a similar *Simmons* claim. *State v. Starnes*, 531 S.E.2d 907 (S.C. 2000). *Starnes* concluded that "the rationale for *Simmons* simply does not exist when there is a potential mandatory minimum thirty year sentence", because unlike a sentence of life without parole, "a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society". *Starnes*, 531 S.E.2d at 915-17.

Finally, *Starnes* rejected the claim that the jury, after just convicting the defendant of two murders, therefore necessarily was going to find the aggravating factor that "two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct". The court found it "inappropriate to assume the jury would find an aggravating circumstance" beyond a reasonable doubt, and thus concluded that "a potential mandatory minimum thirty year sentence existed" precluding the need for a parole ineligibility charge. *Id.* at 917.

SUMMARY OF THE ARGUMENT

The new South Carolina death penalty structure presents three options upon a conviction for murder: a mandatory minimum sentence of at least thirty years, a life sentence until the death of the offender and a death sentence. Since under South Carolina's new death penalty sentencing scheme there was legally available to Petitioner a definite term sentence as an alternative to death and life without parole, the South Carolina Supreme Court properly ruled that there was no triggering of the rule in *Simmons v. South Carolina*, 512 U.S. 154 (1994). When *Simmons v. South Carolina* was decided there was no finite term sentencing option available at the time the penalty phase jury instructions were given; indeed, there were no other sentencing alternatives

than a life sentence without parole or death. Now, there is a third option that exists at the time the jury receives its instructions.

In *Simmons*, the Court held that when the state argues future dangerousness and "the only available alternative sentence to the death penalty is life without parole," the jury was entitled to be told in instructions or argument that the life sentence would be without parole. Since in Petitioner's case life was not "the only available alternative sentence to the death penalty", *Simmons* does not mandate further instructions in the new South Carolina sentencing structure.

Since it was impossible to predict at the time of the jury charge and closing argument that the jury would make the necessary findings to preclude the possibility of a definite term sentence, then life without parole was not the only available alternative sentence to death, and a *Simmons* instruction was not required. In South Carolina, the narrowing decision is done during the penalty phase deliberations by the jury. As interpreted in *Ramdass v. Angelone*, 120 S.Ct. 2113 (2000), *Simmons* does not require trial judges in South Carolina to gauge the probability of future events in determining whether life without parole is the only available alternative sentence. The South Carolina Supreme Court's decision not to extend *Simmons* beyond the circumstances of that case was well founded where options including a definite term, parole under the definite term, the continuing possibility of pardon and other foreseeable and unforeseeable options for potential release existed at the time of the sentencing instructions.

Further, the rule of *Simmons* was satisfied by defense arguments that the Petitioner would be in jail for the rest of his life, and the trial judge's "until death of the offender" charge. This combination of argument and instructions made clear that the Petitioner would serve a life sentence until he died in the prison. Due process does not require more.

Finally, Simmons was not applicable because the prosecution did not argue future dangerousness as a reason to support a death sentence. The rule in *Simmons* is clear that the prosecution must raise future dangerousness as a condition precedent to the requirement of a *Simmons* instruction. Since the prosecution did not argue future dangerousness, the trial judge was not required to instruct under *Simmons*.

ARGUMENT

I. Since under South Carolina's death penalty sentencing scheme there was legally available to Petitioner a definite term sentence as an alternative to death and life without parole, the South Carolina Supreme Court properly ruled that the rule from *Simmons v. South Carolina* was not triggered.

This Court has repeatedly said that, subject to the due process rule of *Simmons*, states retain "some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case". *Ramdass v. Angelone*, 120 S.Ct. 2113, 2119 & 2121 (2000) (citing *O'Dell v. Netherland*, 521 U.S. 151 (1997). *See also Simmons v. South Carolina*, 512 U.S. 154, 176 (1994) (O'Connor, J., concurring) (citing *California v. Ramos*, 463 U.S. 992, 1013 n. 30 (1983)). The question in this case thus becomes whether the rule in *Simmons* was triggered under the sentencing scheme in place at the time of Petitioner's trial.

At the time of the sentencing jury's charge, there existed under state statutory law the possibility that Petitioner could have received as little as a 30-year mandatory minimum sentence based on the jury's findings. Because, therefore, life without parole was not the only alternative sentence to death, *Simmons* was not triggered, and due process did not require the trial judge to charge

the sentencing jury that Petitioner would get life without parole if the jury did not recommend death.

A. *Simmons v. South Carolina* and South Carolina's old sentencing scheme as compared to the sentencing scheme under which Petitioner was tried.

Previously, *Simmons* issues arose in the context of the old South Carolina penalty scheme for capital murder cases. Under the old law, if the jury found no aggravating factors in the penalty phase, the defendant received life in prison with a 20-year parole eligibility. If the jury found aggravating circumstances but did not recommend the death penalty, the defendant received life with a 30-year parole eligibility. Of course, the finding of aggravating circumstances would entitle the jury to recommend death for the offender. See S.C. Code Ann. § 16-3-20 (Supp. 1995).

In *Simmons* itself, the defendant pled guilty to a number of violent crimes prior to his death penalty trial. Therefore, regardless of whether the jury found aggravating circumstances, Simmons was ineligible for parole under South Carolina's section 24-21-640, because that section precludes parole for those with a second conviction for a violent crime defined under South Carolina Code section 16-1-60. *See* 512 U.S. at 156. The trial court prevented Simmons from mentioning parole during *voir dire*, and denied the defense's request for a life without parole charge. 512 U.S. 159-61. During closing, the solicitor argued future dangerousness as a justification for imposition of the death penalty on Simmons. 512 U.S. at 157, 176. After the jury inquired of the judge whether a life sentence carried the possibility of parole, the judge gave a charge that (1) death and life imprisonment should be considered in their plain and ordinary meaning, and (2) parole eligibility was not for the jury's

consideration. The jury then returned a death sentence. 512 U.S. at 160.

Simmons reversed the sentence, with the plurality reasoning that due process prevented the state from creating "a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512 U.S. at 171.

The present penalty scheme for capital murder is different from the one at issue when *Simmons* was decided. Under the present South Carolina Code section 16-2-30, if the jury in a capital case fails to find any aggravating circumstances, then the jury makes no sentencing recommendation, and the trial court has discretion to sentence the defendant anywhere from at least a mandatory minimum term of 30 years to life without parole. Pursuant to sections 24-13-100 and -125, no part of the finite term sentence can be reduced by parole.[1] If the murder defendant had at least one prior conviction of a "most serious offense," then the defendant **must** be sentenced to life without parole. S.C. Code Ann. § 17-25-45 (Supp. 1997). If the defendant has at least two prior convictions of a "serious offense," then solicitors in their discretion could seek a life without parole sentence. S.C. Code Ann. § 17-25-45 (Supp. 1997).[2] Although not eligible for parole,

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[1] In *Starnes*, the South Carolina Supreme Court opined that the language of section 16-3-20 made it "arguable [that] a defendant sentenced to more than thirty years [would be] eligible for parole after service of thirty years. 531 S.E.2d at 917 n. 17. *Cf.* S.C. Code Ann. § 16-3-20(A) (Supp. 1999) *with* S.C. Code Ann. 24-13-100 (Supp. 1999).

[2] A murder defendant sentenced to life without parole under section 17-25-45 could still be paroled for geriatric, health, or other extraordinary reasons. S.C. Code Ann. § 17-25-45(E) (Supp. 1997).

a person sentenced to life is still eligible for a pardon. S.C. Code Ann. §§ 24-21-920 to -1000 (1977 & Supp. 1999).

If, on the other hand, the jury finds aggravating circumstances but does not recommend a death sentence, then the trial court must sentence the defendant to life without parole. Of course, the jury can recommend a death sentence only if it finds aggravating factors. S.C. Code Ann. § 16-3-20 (Supp. 1997).

The jury during the sentencing phase of a South Carolina capital case is given all of its instructions at one time before retiring to deliberate, at the same time, on both the presence of aggravating factors and, if necessary, the punishment.

B. Triggering of the rule in *Simmons* requires that life without parole be the *only* available alternative sentence to death.

Simmons established a two-part test for triggering of its mandate:

> (1) the state must argue future dangerousness in the trial, and
>
> (2) "the only available alternative sentence to the death penalty is life without parole."

See Simmons, 512 U.S. at 169 (plurality uses "alternative sentence to death is life without parole" language in its statement of the holding); 512 U.S. at 177 (concurring opinion uses "only available alternative sentence to death" language).

Petitioner asserts that the "only available alternative to death" language in Justice O'Connor's concurring opinion is not the holding of *Simmons*, and argues that a *Simmons* instruction is

required whenever life without parole is merely one of the sentencing options. However, both the plurality in *Simmons* and *Ramdass* used or recognized the "alternative sentence" language. *Simmons*, 512 U.S. at 169 (plurality uses "alternative sentence to death is life without parole" language in its statement of the holding); 512 U.S. at 177 (concurring opinion uses "only available alternative sentence to death" language). *See also Ramdass*, 120 S.Ct. at 2120 (plurality cites with approval Justice O'Connor's "only available alternative sentence" language); 120 S.Ct. at 2126 (Justice O'Connor reiterates her "only available alternative sentence" language in the concurring *Ramdass* opinion). Indeed, even the *Ramdass* dissent used Justice O'Connor's "only available alternative sentence" language in its statement of the *Simmons* rule, 120 S.Ct. at 2135, and Justice O'Connor stated in *Ramdass*:

> In *Simmons v. South Carolina . . ., a majority of the Court held* that "where the State puts the defendant's future dangerousness at issue, and the only available alternative sentence to death is life imprisonment without the possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible".

Ramdass, 120 S.Ct. at 2126 (emphasis). *See also O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (Justice O'Connor's concurring opinion in *Simmons* provided the dispositive votes necessary for the judgment); *Keel v. French*, 162 F.2d 263 (4th Cir. 1998) (recognizing Justice O'Connor's concurring opinion in *Simmons* as a statement of the case's holding).

Based on this language, South Carolina and other jurisdictions interpreting *Simmons* have held that it does not apply, even if the prosecutor argues future dangerousness, *unless*

the only other available alternative to a death sentence is life without the possibility of parole. *See Shafer*, 531 S.E.2d at 528; *State v. Byram*, 485 S.E.2d 360 (S.C. 1997); *State v. Simpson*, 479 S.E.2d 57 (S.C. 1996); *State v. Williams*, 468 S.E.2d 626 (S.C. 1996). *See also Kinnamon v. Scott*, 40 F.3d 731 (5th Cir. 1994) (not extending *Simmons* "beyond cases where the sentencing alternative is life without parole"); *People v. Simpson*, 665 N.E.2d 1228, 688 (Ill. 1996) ("*Simmons* addresses those situations where state law mandates that if the defendant is not sentenced to death, the only alternate sentence is natural life imprisonment); *State v. Chapman*, 464 S.E.2d 661 (N.C. 1995) (*Simmons* only applies where life without parole was the alternative to death); *State v. Loftin*, 680 A.2d 677, 714 (N.J. 1996) (rejecting claim to *Simmons* instruction because the state did not proffer future dangerousness as an aggravator and the only available alternative sentence to death was not life without parole); *Collier v. State*, 959 S.W.2d 621, 623-24 (Tex. Crim. App. 1997) (interpreting the *Simmons* test as requiring "the state [to put] the defendant's future dangerousness in free society in issue" and "the only available alternative sentence to death is life without parole"); *Mueller v. Murray*, 478 S.E.2d 542, 546-47 (Va. 1996) (stating that the *Simmons* instruction is required "where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life without parole"). *See also United States v. Flores*, 63 F.3d 1342, 1366-68 (5th Cir. 1995).

The rationale for the "only available alternative sentence" rule is obvious: there is no "false dilemma" from future dangerousness argument if the defendant's possible alternative sentences to death include a sentence from which the defendant would be released into society again. The fact that it is the "false dilemma" that drives the *Simmons* rule is further shown by both the plurality and concurring opinions' statement that the prosecution is free to argue without a life without parole charge

that the defendant will be a future danger in prison. *Simmons*, 512 U.S. at 165 n. 5; 512 U.S. at 177. There is no "false dilemma" from the lack of a "no parole" charge where the argument is that the defendant will be dangerous in the future to those he encounters within prison walls.

Thus, if there is an available alternative sentence to death other than life without parole, then *Simmons*'s rationale, and its rule, is not triggered.

C. If present as an alternative to death, either life with parole or a definite term sentence would preclude the necessity for a *Simmons* instruction.

The next step depends on making an analogy between a life sentence with the possibility of parole under the old South Carolina scheme (which was present in *Simmons*), and a definite mandatory minimum sentence under the new penalty scheme (which is present in this case). Such an analogy is appropriate.

As noted before, the concern in *Simmons* was that the solicitor had created a "false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512 U.S. at 171. As held in *United States v. Flores*, 63 F.3d 1342, 1366-68 (5th Cir. 1995), it does not matter whether the "false dilemma" is avoided by the presence of a life sentence with parole, or whether it is avoided because the defendant could potentially receive a sentence of a definite term. The mechanism by which Petitioner could be released, either parole or expiration of a definite term, is irrelevant because release is inherent in either type of sentence, and the "false dilemma" of a future dangerousness argument only exists where the defendant will never be released. *See Ramdass*

v. Angelone, 120 S.Ct. 2113, 2135 (2000) ("If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . *will never be part of society again*." (Stevens, J., dissenting) (emphasis added); *Starnes*, 513 S.E.2d at 916 (unlike a sentence of life without parole, "a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society").

Indeed, release is *inevitable* with a definite term sentence, while only *possible* with parole. A definite term sentence is thus a stronger reason why the prohibited "false dilemma" is not created. Thus, if a definite term sentence of at least thirty years was a possibility for Petitioner under South Carolina's sentencing statute, then the *Simmons* false dilemma was not met, and the state law rule in *State v. Norris* properly controls. *Shafer*, 531 S.E.2d at 531 (citing *State v. Norris*, 328 S.E.2d 339 (S.C. 1985)).

D. Since it was impossible to predict at the time of the jury charge and closing argument that the jury would make the necessary findings to preclude the possibility of a definite term sentence, then life without parole was not the only available alternative sentence to death, and a *Simmons* instruction was not required.

The life without parole provisions in section 17-25-45 were not triggered in this case.[3] JA 225, 234-35. Thus,

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[3] Petitioner did have a prior conviction for criminal sexual conduct (CSC) with a minor 2nd, and non-violent burglary 2nd. JA 31-36. However, the solicitor never served notice that he sought sentencing under section 17-25-45; thus, even though a life without parole sentence is mandatory if the defendant has a one prior "most serious offense," such a sentence could not have been given to Shafer absent the appropriate statutory notice. S.C. Code Ann. 17-25-45(G) & (H) (Supp. 1998). Moreover, the CSC 2nd would be the only possible

depending on the findings of the jury on the sentencing phase, Petitioner faced three possible sentencing alternatives: 30 years, life without parole, or death. Since there was legally available to Petitioner a potential alternative sentence to death other than life without parole, the first prong of *Simmons* is not met.

Petitioner points out that the definite term sentence is a possibility only if the jury does not find an aggravator, and the jury has no sentencing role, and does not deliberate future dangerousness, unless it finds an aggravator. Of course, when the *Simmons* test is triggered, the required remedy is either a jury instruction or defense argument that a life sentence is without parole. *See Simmons*, 512 U.S. at 178 (O'Connor, J., concurring). Obviously, the time for determining the propriety of requested jury charges or closing argument *is at the time the charge or argument is to be given to the jury*. And, although it is true that if the jury finds an aggravating factor the possibility of the definite term sentence ceases to exist, juries in South Carolina receive all their sentencing phase instructions and argument at one time before retiring to deliberate on *both* the presence of aggravators and, if necessary, the proper punishment. Thus, it cannot be disputed that at the time the trial judge must decide on the propriety of charges and argument, there remains legally

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"most serious offense;" however, the statute excludes CSC 2nd with a minor where the act was consensual, and the testimony in the sentencing phase reflects that in fact the 12-year old girl consented to sex with Shafer. S.C. Code Ann. 17-25-45 (C)(1) (Supp. 1998). JA 38-40. The light sentence further indicates the judge found the sex was consensual. JA 70-72. Since 17-25-45 could not be invoked absent notice which was not given in this case, and since it does not appear that Shafer's CSC would qualify as a "most serious offense," then he had the possibility of a definite term sentence for murder if the jury did not find an aggravator.

available under state law a definite term sentence as an alternative to death and life without parole.[4]

The Fifth Circuit reached a similar conclusion in *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995). There, co-defendant Juan Garza faced a capital trial in federal court for a number of murders related to drug trafficking. The evidence against Garza showed that he either contracted for or participated in the murders of three men. 63 F.3d at 1351-52. Garza requested the jury be instructed that life without parole was the only alternative sentence, but the trial court instead told the jury that, if the jury did not recommend death, the court could impose either life without parole or another sentence. 63 F.3d at 1367. Under 21 U.S.C. § 848(e), the court could sentence the defendant to "any term of imprisonment" from 20 years to life without

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[4] It is Petitioner, however, that takes statements in *Ramdass* out of context when he quotes the plurality's explanation of the holding of *Simmons*. *See* Brief for Petitioner p. 24 (stating: "Later, Justice Kennedy elaborated on this point, observing that under *Simmons*, a "parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law.").

Justice Kennedy was merely describing *Simmons*'s applicability to a scheme where a life sentence carried the possibility of parole unless the defendant's prior record precluded parole. Justice Kennedy was not addressing a scheme like the one present in this case, where a mandatory minimum definite term sentence was a third option to life without parole and death. Under the South Carolina sentencing scheme at issue here, at the time of jury charge and argument the jury still has yet to make a factual finding beyond a reasonable doubt *about the crime itself* which would preclude the definite term sentence and make the defendant "death eligible". *See* S.C. Code Ann. § 16-3-20 (Supp. 1999). In contrast, under the Virginia scheme in *Ramdass*, the jury's guilt phase findings define the crime as capital, and in the sentencing phase future dangerousness is expressly submitted as an aggravator and already at issue at the time of the jury charge and closing argument. *See* Va. Code Ann. §§ 18.2-31 and 19.2-264.4 (Michie 1992). As such, Justice Kennedy's statements cannot be read in isolation to preclude the state's argument here.

parole, assuming the jury did not recommend death. In addition to some mitigators, Garza's jury found first-tier aggravators, second-tier aggravators, and non-statutory aggravators, including that Garza premeditated and planned the killings, that he participated in a contract killing, and that he was also responsible for five more killings. Flores, 63 F.3d at 1366-67.

Garza argued that *Simmons* was triggered because if the jury did not return a death sentence, the trial court would have had no choice but to impose life without parole. According to Garza, a comment in the Federal Sentencing Guidelines necessarily and expressly prevented the trial court from imposing a lower sentence than life without parole, because the jury found that the defendant intentionally killed his victims. Garza also argued that certain enumerated factors authorizing lower sentences in the Federal Sentencing Guidelines, were not present in his case. *Flores*, 63 F.3d at 1367-68.

In rejecting this argument, the *Flores* decision stated:

> However, assuming without deciding that the jury's findings of intentional killing would be binding on the sentencing judge and therefore prevent a downward departure, **the court could not predict before the jury begins its** [sentencing phase] **deliberation** whether it is going to find the necessary intent. Thus, when the attorneys make their final arguments in the penalty phase and **when the court gives its penalty instructions, no one would know whether life imprisonment would be the only permissible sentence**.

63 F.3d at 1368 (emphasis added). Moreover, the court also concluded that the general discretionary mitigator in the

Sentencing Guidelines at least remotely left the possibility that Garza could receive a lesser sentence. Thus, *Flores* rejected the *Simmons* claim because a life without parole sentence was not the only legal sentence Garza could have received. *Flores*, 63 F.3d at 1368.[5]

Just like *Flores*, at the time the attorneys gave their penalty phase arguments and the judge gave his penalty phase charge in Petitioner's case, no one could have conclusively predicted whether the jury would find a necessary aggravator. Therefore, it was impossible to know whether life without parole would be the only possible alternative sentence until after the jury's penalty phase verdict. If the jury had not found an aggravator, then Petitioner could have received a sentence as low as 30 years. Accordingly, he had a *legally available sentence* besides death and life without parole, and thus the *Simmons* test is not met.

In his brief, Petitioner attempts to distinguish *Flores* by pointing out that while under the South Carolina scheme the jury's finding of an aggravator creates a choice between death and life without parole, under the federal death penalty scheme at issue in *Flores*, the *court* could impose life without parole or some lesser sentence if the jury found sufficient aggravators, but failed to return a death sentence. *See* Brief of Petitioner p. 23

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[5] In *People v. Simpson*, 665 N.E.2d 1228 (Ill. 1996), the court also rejected a similar argument. The defendant on appeal claimed the trial judge erred by only instructing the jury that the court would impose some other sentence on the defendant if the jury did not return a death sentence. The *Simpson* court noted that an life without parole instruction would be required in a multiple murder situation where under statutory law life without parole would be the only alternative sentence. Thus, the court held *Simmons* inapplicable because the defendant, who only killed one person, was statutorily eligible for a sentence other than life without parole. 665 N.E.2d at 1244-45.

(discussing 21 U.S.C. § 848(k)). However, in *both* the South Carolina and federal schemes the court could impose a lesser sentence if the jury did not find the necessary aggravator. More importantly, *Flores assumed* that the jury's finding of the intent aggravator would preclude any other alternative sentence to death other than life without parole, but still reasoned that the *Simmons* test was not met because no one could conclusively predict at the time of the closing arguments and jury charges whether the jury would find the necessary intent aggravator. *Flores*, 63 F.3d at 1368. Thus, for purposes of the reasoning in *Flores*, the two schemes were essentially identical, and the case is not distinguishable.

E. *Simmons* does not require trial judges in South Carolina to gauge the probability of future events in determining whether life without parole is the only available alternative sentence.

In *Ramdass v. Angelone*, this Court rejected application of a "functional" approach to the *Simmons* test, in a situation where the defendant had received a guilty verdict for a life without parole-qualifying prior offense, but there had not been an entry of judgment as required by state law. *Ramdass v. Angelone*, 120 S.Ct. 2113, 2117-20 (2000). Both the plurality and concurring opinions in *Ramdass* found it neither "necessary [n]or workable" for trial courts to "evaluate the probability of future events" in order to determine whether the Simmons test was met. *Ramdass*, 120 S.Ct. at 2121, 2127-28.

Similarly, in this case a trial court would have to evaluate the future likelihood that the jury would find an aggravator beyond a reasonable doubt. Even though the jury only chooses between life without parole or death if it finds an aggravator, the jury's findings still ultimately drive which one of the three

sentencing options is available to the defendant. In South Carolina, when the murder defendant seeks a jury trial, the jurors decide whether aggravating factors are present. *State v. Smith*, 298 S.C. 482, 381 S.E.2d 724 (1989) ("In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight."); *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986) ("The trial judge must submit to the jury those aggravating circumstances are supported by the evidence.").[6] Petitioner asked for and got his jury trial; it is speculative and would make the jury's role in determining aggravating factors irrelevant to contend that at the time of the charge only death and life without parole were available. *See State v. Starnes*, 531 S.E.2d 907 (S.C. 2000) ("inappropriate" to assume jury will necessarily find existence of an aggravator beyond a reasonable doubt).

Admittedly, Petitioner's counsel did argue to the jury that "you're going to find a statutory aggravator." JA 197-98. However, Petitioner did not concede the aggravator as a matter of law. Instead, the jury was instructed of its duty to find an aggravator beyond a reasonable doubt and that it should stop further deliberation if it failed to so find. JA 202, 206, 210-12. Thus, like *Flores*, at the time the judge charged the jury, the definite term sentence was still a possibility, and life without parole was not the only legally available alternative sentence to death. *Cf. also State v. Mitts*, 690 N.E.2d 522, 528-29 (Ohio 1998) (rejecting *Simmons* argument that trial judge erred in failing to answer jury's question whether two life sentences would be served consecutively, and noting, "[defense] counsel's

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[6] *See also* S.C. Code Ann. § 16-3-20(B) (Supp. 1997) ("The [sentencing] proceeding must be conducted by the trial judge before the trial jury . . . . If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge.").

argument that it was unrealistic to think that the trial judge would impose concurrent sentences here is speculative.").

Moreover, *Simmons* is not triggered when the defendant's entitlement to a third sentencing alternative depends on resolution of a matter of fact. In *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994), *cert. denied*, 489 U.S. 1040 (1989) the court rejected a *Simmons* claim from a defendant who was technically eligible for parole. The defendant claimed error in (1) the failure of the trial court to admit expert testimony that a Texas parole board "almost certainly" would consider the defendant ineligible for parole, and (2) the judge's failure to so charge the jury. *Scott* reasoned that *Simmons* requires that the defendant's parole ineligibility turn on a matter of law, NOT a matter of fact. Thus, the court concluded:

> A capital defendant's parole ineligibility must be a matter of law because evidence of such ineligibility is inherently "truthful" . . . . **But if a defendant's parole ineligibility is a matter of fact, i.e. the defendant probably will not be eligible for parole, then the evidence is purely speculative** (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness.

Scott, 41 F.3d at 21-22 (emphasis added). Just like *Scott*, where the defendant's parole ineligibility depended on a parole board's determination of fact at some point in the future, here, whether Petitioner was eligible for a mandatory minimum 30-year sentence depended on his jury's resolution of a matter of fact. Thus, *Simmons* is inapplicable.

Unlike the *Ramdass* plurality, concurrence, and dissent's disagreement over the effect of entry of judgment under Virginia law, certainly a jury's duty to make factual findings of an

aggravator beyond a reasonable doubt can hardly be termed to be "ministerial" or "inevitable and foreordained". *Ramdass*, 120 S.Ct. at 2123, 2127. As such, the *Simmons* test is not met. As such, and like *Ramdass*, Petitioner has not "conclusively established" that life without parole was the only available alternative sentence to death at the time the judge had to determine the appropriate charges to give. *Ramdass*, 120 S.Ct. at 2120. *Simmons* is not triggered.

Of course, the practical effect of such a rule is that solicitors may argue future dangerousness without the necessity of a life without parole charge, unless the qualifying "serious offenses" or "most serious offenses" trigger life without parole under South Carolina Code section 17-25-45. Petitioner contends that the South Carolina Supreme Court has ruled *Simmons* inapplicable to its sentencing scheme. However, the state court's result is no different than what existed under the old South Carolina scheme, as even under the statutory scheme in *Simmons* itself solicitors could argue future dangerousness without a life without parole charge, unless the defendant had a prior "violent crime" making him ineligible for parole under South Carolina Code section 24-21-640. In this case, *Simmons* is inapplicable unless the defendant's prior record qualifies him for life without parole under section 17-25-45. In both the *Simmons* situation and the present situation, it is the defendant's prior record that drives the applicability of *Simmons*, and there is no material difference between the situations.

F. The South Carolina Supreme Court had "good reason" not to extend *Simmons* beyond the circumstances of that case.

As noted before, subject to the due process rule of *Simmons*, states retain "some discretion in determining the extent to which a sentencing jury should be advised of probable future

custody and parole status in a future dangerousness case". *Ramdass v. Angelone*, 120 S.Ct. 2113, 2119 & 2121 (2000). South Carolina has long held that parole eligibility or ineligibility are not proper considerations for a capital sentencing jury. *Shafer*, 531 S.E.2d at 532.

Petitioner seeks to create within the jurors a sort of reverse-*Simmons* "false sense of security," that if they fail to return a death sentence, life without parole will be imposed. This is inaccurate, unfair to the state, and not constitutionally required.[7] *See Ramdass v. Angelone*, 120 S.Ct. 2113, 2120 (2000) ("In this case, a *Simmons* instruction would not have been accurate under the law."); *Simmons*, 512 U.S. at 161-62 ("grievous misperception [about life without parole] was encouraged by the trial court's refusal to provide *accurate information* regarding petitioner's parole eligibility) (emphasis added); *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (*Eighth* Amendment requires provision of "accurate" sentencing information); *State v. Shafer*, 531 S.E.2d 524, 531 (S.C. 2000) ("Informing the jury that appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.").

Indeed, common sense dictates that when juries inquire about parole, they are really asking for assurance that the defendant will never get out of prison again for any reason. Juries mention the word "parole", because that is the concept of early release that is familiar to the layperson. However, even a defendant sentenced to life without parole under South Carolina's murder statute could still benefit from pardon or clemency. *See* S.C. Code Ann §§ 24-21-920 to -1000 (1977 & Supp. 1999).

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[7] Further, defense counsel conceded at trial that "juries from May 30th, 1996 have three options in the state of South Carolina." JA 234.

Moreover, as the plurality noted in *Ramdass*, a parole ineligibility charge is of "uncertain materiality", and can be overcome if a jury concludes the defendant may escape, be pardoned, benefit from a change in state laws, or be dangerous to society in prison. *Ramdass*, 120 S.Ct. at 2122. Thus, only answering a jury's "parole" question leaves the false impression that the defendant will never get out of prison, when in fact many mechanisms and contingencies still exist for release.

Because of this, a state can legitimately decide to avoid these other forms of release and future dangerousness for the extraneous and collateral litigation they bring to a capital sentencing proceeding, while also deciding, subject to the limited rule of *Simmons*, to avoid the false impression that a strict life without parole answer alone provides. *See generally Ramdass*, 120 S.Ct. at 2121-22 (plurality opinion) (if the inquiry includes whether the defendant may be released at some point from prison, even the age or health of the prisoner may be relevant, and a state "might well conclude that the jury would be distracted from the other vital issues in the case").

By the same token, practical problems would justify the decision not to charge the jurors that if they fail to find an aggravator, the judge will sentence the defendant anywhere from thirty years to life without parole, but if they do find an aggravator, the defendant faces either death or life without parole. Such a charge could potentially create a "reverse-*Caldwell*"[8] diminishment of the jurors' sense of sentencing responsibility, in that they would be aware they could do nothing and sentencing would be handled by the judge. *Cf. generally Jones v. United States*, 527 U.S. 373, 384 (1999) (in *Eighth Amendment* context, noting that although it would be accurate to charge the jury that deadlock will result in sentencing by the judge, that information

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[8] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

would be withheld because it was "an open invitation for the jury to avoid its sentencing responsibility and to disagree") (quoting *Justus v. Virginia*, 266 S.E.2d 87 (1980)). If the trial judge was to advise the jury on the likely sentence he would give if the jury did not return an aggravator, that would effectively create a "third choice" violative of the South Carolina legislature's "either/or" sentencing scheme. *See State v. Norris*, 328 S.E.2d 339 (S.C. 1985). *Cf. Jones*, 527 U.S. 373 (instruction on effect of jury deadlock might undermine governmental interest in decision between life or death).

Because evidence of parole ineligibility is of "uncertain materiality", and because of the potential of practical problems and collateral litigation in charging a jury under the new sentencing scheme, the South Carolina Supreme Court had "good reason" not to extend *Simmons* beyond the circumstances of that case.

II. *Simmons* was satisfied by defense argument and the judge's "until death of the offender" charge.

Even if this Court finds *Simmons* was triggered, the defense's closing argument and the judge's charge fulfilled the requirements of *Simmons*.

Simmons stated that its mandate would be satisfied if information about the defendant's parole ineligibility is presented to the jury through *either* an instruction from the court or argument of defense counsel. 512 U.S. at 169, 177.[9]

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[9] In *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *overruled on the grounds in State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995), the South Carolina Supreme Court held that trial courts had to give life without parole instructions if the *Simmons* 2-prong test was met and the defendant requested such an instruction. However, the issue before this Court in the present case concerns only the federal constitutional mandate in *Simmons*, and not any purely state law expansion of the rule.

In his sentencing phase closing, Petitioner repeatedly made "pine box" arguments that he would never leave prison if he received a life sentence. JA 192, 194, 196, 198-99. *See generally State v. Loftin*, 680 A.2d 677 (N.J. 1996) (argument that defendant will die in jail would satisfy *Simmons*).

As stated above, the jury was apprised by the defense in argument the following:

> "we know that it ended in a way that Wesley Shafer is going to die in prison. The question is will the state executed him *or will he just die in prison*...
>
> ...Wesley Shafer is leaving prison in a pine box..,We just ask that he be able *to spend his natural life there*....

JA 192.

> ...putting a 19 year old in prison *until he is dead*...
>
> ...and you can put him someplace *until he is dead*, where he will have the opportunity every single day to think about what he has done. Life in prison *until death*.

JA 194.

> ...Wesley Shafer is going to prison and *stay there*....

JA 196.

> ...make him go to prison with men *for the rest of his life until he dies* or whether you sentence him to death. Its just a matter of *where he dies*.
>
> ...I'm asking for the small amount of mercy it takes to make a 19 year old die in prison... When they say give him life, *he's not going home*... a child spend the rest of his life in prison.
>
> ...Is there anyone among us who wants to spend the rest of his life in prison?...send a 19 year old to prison *for the rest of his life*....

JA. 198-199.

In its instructions, the trial judge initially emphasized that "life imprisonment means until the death of the defendant." JA 201. The judge repeated this concept of imprisonment until death throughout his instructions. JA 214 ("imprisoned in the state penitentiary for the balance of his natural life.")

Further, when the jury made its inquiry about whether there was a "remote chance that someone who was convicted of murder could become eligible for parole" and "under what conditions would someone convicted of murder be eligible?", the trial court answered the inquiry in the following direct manner:

> ...Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge.
>
> Section 16-3-20 of our Code of Laws as applies to this case in the process we're in, states that, quote, for the purposes of this section *life imprisonment means until the death of the offender*, end quote.

> Parole eligibility or ineligibility is not for your consideration.

JA 239-240.

In *Simmons*, the Court found that "the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning" was insufficient to satisfy that requirement. Here, however, the imprecise "a plain and ordinary meaning instruction" was not given as in Simmons. Instead, the concept of early release was removed from the jury's consideration by the judicial definition that "*life imprisonment means until the death of the offender*." The "until death" concept was ameliorated by its forceful restatement upon the jury's questions as well as by the uncontested defense arguments that he will die in prison.

In *Weeks v. Angelone*, 528 U.S. 225, 120 S.Ct. 727, 733 (2000), this Court reiterated that "a jury is presumed to follow its instructions", citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Further, the Court recognized that "a jury is presumed to understand a judge's answer to its question." Id.

Here, the jury was told two things in response to its parole inquiry. First, it was told that a life sentence meant imprisonment until death. Second, it was told it *could* not consider parole eligibility *or ineligibility* in making its decision. The jury must be presumed to have understood the plain language of "until death of the offender" which removes early release. Third, in response to its inquiry about factors or conditions for parole, the judicial direction that it "is not for your consideration" resolved those concerns.

As in *Weeks*, this jury must be presumed to have followed the instructions of the trial judge. In doing so, the jury necessarily

would have understood that its sentence for life imprisonment meant he would be in prison until he dies. The due process concerns of *Simmons* were satisfied in this case where the defective "plain and ordinary meaning" instruction was not given. Given that the jury was adequately instructed that he would be in prison until his death and given that the trial judge's response directed the jury's attention to its earlier adequate instruction and remove parole from its consideration, the Constitution does not require more. The jury was not faced with the "false dilemma" condemned by *Simmons*. 512 U.S. at 171.

III. The prosecution did not argue future dangerousness; thus, the rule in Simmons was not triggered.

As noted before, the *Simmons* test requires that both prongs be present for its rule to attach. Thus, if the solicitor did not argue future dangerousness, a *Simmons* charge is not necessary. The trial judge repeatedly found that future dangerousness was not an issue in this case. JA 164, 188-89, 191-92.

As an initial matter, Petitioner seems to challenge the premise that future dangerousness argument by the prosecution, or at least some express reliance on future dangerousness by the prosecution, is necessary to satisfy first prong of the *Simmons* test. Such a view is as odds with this Court's expression of the *Simmons* rule. *See Ramdass*, 120 S.Ct. at 2117 (plurality opinion) (state submitted to the jury a future dangerousness aggravating circumstance); 120 S.Ct. at 2126 (concurring opinion) (noting that the state must seek "to demonstrate that the defendant poses a future danger to society"); 120 S.Ct. at 2135 (dissenting opinion) (stating: "If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . will never be part of society again."). *See also Simmons*, 512 U.S. at 162 ("grievous misperception" encouraged by "state's repeated suggestion that petitioner would pose a future danger to society); 512 U.S. at 163 (prosecutors in South Carolina often emphasize a defendant's future dangerousness in their evidence and argument, and they urge the jury to sentence the defendant to death so he will not be a danger to the public if released); 512 U.S. at 168-69 ("If the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future . . .").

If Petitioner is correct that the state raises future dangerousness by merely introducing evidence in the sentencing phase about a murder defendant's past criminal conduct and bad acts, then the first prong of *Simmons* would be superfluous and *Simmons* would apply to every capital case where the only alternative sentence to death was life without parole. Justice O'Connor flatly rejected such a view in *Simmons*:

> Likewise, if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death" is life without parole.

512 U.S. at 175 (O'Connor, J., concurring). Similarly, the *Simmons* plurality also implied that character, prior criminal history, and background are not the same thing as future dangerousness. 512 U.S. at 164 ("The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, *in addition to future dangerousness*, that a jury may consider in fixing punishment." (Emphasis added)).

Further, both the *Simmons* plurality and Justice O'Connor in concurrence recognized that the state could legitimately argue

that the defendant would be a future danger to other inmates and prison staff, without triggering the rule in *Simmons*. 512 U.S. at 165 n. 5; 512 U.S. at 177. Clearly, it is the use to which the prosecution puts the evidence which triggers the rule in *Simmons*.[10]

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[10] In *Ramdass*, the plurality addressed various polls submitted to the Court under the guise of citing law review articles. The plurality rejected consideration of the polls, reasoning that: (1) citation of a law review does not suffice to prove the truth of the hearsay, (2) the creators of the poll did not take the stand in the defendant's case (where they would have been subject to cross-examination on the validity of their methodology and conclusions), (3) the polls were limited in scope, and (4) the polls were conducted by an organization that sought to avoid death sentences. Ultimately, the court noted that the Virginia Supreme Court was "not required to consult opinion polls". Ramdass,120 S.Ct. at 2123-24.

Many of the same deficiencies are inherent in the polls cited in the brief of *amicus curiae* The Cornell Death Penalty Project to support the notion that jurors are confused about length of sentence and always consider future dangerousness. The Cornell Death Penalty Project, which "conduct[ed] empirical analyses of juror decision making in capital cases as a participant in the multi-state Capital Jury Project (CJP)", Brief of *Amicus Curiae* p. 1, is a resource for capital defense attorneys, and its members often represent capital defendants in South Carolina.

Moreover, the tables included at the end of the *amicus curiae* brief reflect sampling of only some 50+ jurors from South Carolina. Similarly, the law review article upon which the *amicus* brief primarily relies reflects difficulties with the methodology. *See* Brief of *amicus curiae* (discussing Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999). For example, the article notes that the CJP examined only four jurors from a mere twenty to thirty capital trials in each state. *See* Bowers & Steiner, *supra*, at 643-44. Moreover: (1) juror interviewers exercised "discretion" to conduct additional interviews of jurors where the initial interviews "raised questions"; (2) in two states more than four jurors were contacted from trial because the minimum sample of trials could not be met; and (3) "the target sample of four jurors per case was not always met due to difficulties in applying the sampling and replacement protocol, locating jurors whose addresses and phone numbers were changed or were not initially correct or sufficiently detailed, and the

Other jurisdictions have reached similar conclusions. *See State v. Bey*, 736 A.2d 469 (N.J. 1999) ("prior murder" aggravator did not raise future dangerousness); *State v. Bey*, 709 N.E.2d 484 (Ohio 1999) (prosecutor did not raise future dangerousness by reviewing evidence of defendant's character, background, and history in response to adaptability evidence); *Commonwealth v. May*, 710 A.2d 44, 47 (Pa. 1998) (evidence of prior criminal conduct does not necessarily raise future dangerousness). Indeed, there are many types of evidence known to law which are admitted for one purpose but not another. *See, e.g.* Rule 404(b), SCRE.

In this case, unlike *Ramdass*, future dangerousness was not submitted to the jury as a statutory aggravator. Unlike

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unwillingness of some jurors to be interviewed. *See* Bowers & Steiner, *supra*, at 644 n. 189.

The accuracy of the polls from South Carolina are further called into question because for about four years, jurors in South Carolina were told about the defendant's 20- or 30- parole eligibility from a life sentence under the old sentencing scheme. *See State v. Atkins*, 360 S.E.2d 302 (S.C. 1987); *State v. Torrence*, 405 S.E.2d 315 (S.C. 1991). Further, prior to the *Simmons* decision in June 1994, prosecutors in South Carolina *could* (and did) argue and raise future dangerousness without being concerned with *Simmons* issues. Also, under the old sentencing scheme, prosecutors could argue future dangerousness without the need for a *Simmons* instruction if in fact the defendant was parole eligible. *See, e.g. State v. Simpson*, 479 S.E.2d 57 (1997). Finally, many prosecutors in South Carolina choose to expressly raise future dangerousness and accept a life without parole instruction. Obviously, there are many capital trials in South Carolina where future dangerousness was expressly raised and/or parole eligibility or ineligibility instructions were given.

It is thus not surprising that South Carolina jurors from unnamed trials in the CJP data would have a parole eligible concept of a life sentence, or would remember future dangerousness arguments or deliberations. The polls simply do not separate out the varying situations to get an accurate assessment of how jurors react to trials such as Petitioner's.

Simmons, the prosecution did call any mental health experts to testify that Petitioner would likely be dangerous in the future. Despite this, Petitioner points to a number of factors from which he asserts the state raised the issue of future dangerousness.

First, Petitioner argues that the boilerplate language in the state's Notice of Evidence in Aggravation of the Punishment raises future dangerousness. Even if true, it is irrelevant; no "false dilemma" in violation of *Simmons* can arise from assertions in a document which is never before the jury. *Cf. Simmons*, 512 U.S. at 171.

Next, Petitioner argues that the evidence that he had been involved in an incident where he and others engaged in sexual conduct with two 12-year-old girls, evidence of his drug use, subsequent arrests, and failure to report while on probation, and evidence that Petitioner got into an altercation with a jail employee, raised the issue of future dangerousness. The South Carolina Supreme Court has rejected similar claims. In *State v. Young*, 319 S.C. 33, 459 S.E.2d 84 (1994), the court rejected a *Simmons* claim by noting that future dangerousness was not an issue. In doing so, the *Young* stated:

> Evidence was presented concerning Young's character and his prior criminal record. Such evidence was, however, relevant in the sentencing phase without regard to future dangerousness. *Simmons v. South Carolina.* There was no contention that Young would one day be released from prison. In fact, counsel for Young stressed to the jury that Young would never be released.

319 S.C. at 39 n. 4, 459 S.E.2d at 87 n. 4. *See also State v. Williams*, 468 S.E.2d 626, 321 S.C. 327 (1996).

In this case, the state introduced evidence about Petitioner's past conduct and prior criminal record. While the solicitor generically referred once to the jury's right to consider Petitioner's character, JA 179, he ***never once*** referred to any of Petitioner's past conduct or criminal record during his argument. The state was entitled to produce evidence of Petitioner's past criminal conduct without triggering *Simmons*, where it never expressly raised to the jury that Petitioner should be sentenced to death because he might be a danger in the future.[11]

With regard to evidence that Petitioner was at risk for explosive outbursts of aggression and drug use, this was evidence that *the defense* introduced at trial. JA 99-107; R. 1711. Even assuming this mental health evidence necessarily went to future dangerousness, the prosecution never introduced nor "used" this evidence, and it certainly cannot be said to have put something into issue by the defense's decision to introduce the evidence. *Simmons*, 512 U.S. at 168-69 ("If *the State rests* its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future . . .") (emphasis added).

Petitioner contends the solicitor did in fact argue future dangerousness when he stated:

> Ladies and Gentlemen, one of the scariest things, certainly the crime, certainly the video, but one of the scariest things I think about that second video, the video where we saw the cash tape, the horror and all of the sound, do you remember the girls that came in and when Jamie Palmer was saying "Oh, God; Oh, God; Ray, Ray" and the

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[11] Moreover, as noted before, both the *Simmons* plurality and Justice O'Connor's concurrence stated that "inside prison" evidence does not trigger *Simmons*.

girls were running in and out, we've got to go, we've got to go, and I tell you what, I've listened to it, you've listened to it, and you will have a chance again, but what is really etched in my mind is Monica Inman. Remember Jamie picks up that phone and she's calling 911, and Monica Inman says "Come on, Jamie, they might come back, they might come back".

Ladies and Gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the State. So that the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, and they might come back, they might come back, they will remember this day, and they will remember this jury, and they will remember this verdict.

JA 185-86. Petitioner contends the reference to "they might come back" raises future dangerousness. The first time the solicitor referred to the phrase, he was describing the evidence. The second time is clearly part of a general deterrence argument, not a future dangerousness argument. The "they" in the second paragraph obviously refers to "the next time somebody thinks about loading up" and coming to Union County, not Petitioner specifically.

It is elementary that a future dangerousness argument is a specific deterrence argument. *See, e.g. Coleman v. Brown*, 802 F.2d 1227 (10th Cir. 1986) (future dangerousness is relevant to specific deterrence); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (future dangerousness is relevant to specific deterrence); *State v. Rose*, 451 S.E.2d 211 (N.C. 1994) (future dangerousness

is a specific deterrence argument). There is a distinction between specific deterrence and general deterrence arguments. *State v. Simmons*, 310 S.C. 439, 445, 427 S.E.2d 175, 179 (1993), *rev'd on other grounds*, 512 U.S. 154 (1994). Thus, a general deterrence argument does not raise future dangerousness.

Moreover, the arguments Petitioner points to in *Simmons* which were held to raise future dangerousness also only sought specific deterrence against the particular defendant. In *Simmons*, the prosecutor told the jury its role was to decide "what to do with [petitioner] now that he is in our midst". The prosecutor also stated: "Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." 512 U.S. at 176. The "someone" in *Simmons* was that particular defendant, not some hypothetical future defendant as argued in this case.

The state was entitled to introduce Petitioner's past conduct and prior record without raising future dangerousness. Since the solicitor only argued general deterrence, and never in fact referred to any of Petitioner's prior record, the state never put future dangerousness into issue. Accordingly, *Simmons* is not triggered, and the sentence should be affirmed.

CONCLUSION

Because life without parole was not the only available alternative sentence to death, the South Carolina Supreme Court correctly ruled that *Simmons* was not triggered, and Petitioner's sentence should be upheld. If this Court decides to reverse that ruling, Respondent requests that the case be remanded to the South Carolina Supreme Court to address Respondent's argument that other forms or possibilities of early release should be charged or argued whenever a life without parole instruction is given.

In the event this Court decides to reverse on the South Carolina Supreme Court's "only available alternative sentence" ruling, *Simmons* was still satisfied by the jury charge and defense argument, and Petitioner's sentence should be upheld.

In the alternative, Respondent requests a remand to the South Carolina Supreme Court to address whether the prosecution triggered *Simmons* by raising future dangerousness. Otherwise, this Court should affirm Petitioner's sentence because the prosecution did not put future dangerousness at issue in Petitioner's trial.

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Supreme Court of the United States

WESLEY AARON SHAFER, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

1. After insisting for 19 pages that *Simmons v. South Carolina*, 512 U.S. 154 (1994), has no application to the present South Carolina capital sentencing scheme, the state adds that both defense counsel and the trial judge adequately informed the jury of petitioner's parole ineligibility in any event. Brief for Respondent at 38-42. The record shows otherwise.

According to the state, defense counsel's jury argument to the effect that petitioner would "die in prison" satisfied the due process requirement of *Simmons*. While "due process does not dictate that the judge herself, rather than defense counsel, provide the instruction," *Simmons, supra*, 512 U.S. at 174 (Ginsburg, J., concurring), the whole point of *Simmons* is that the jury must be informed that the defendant will be *ineligible for parole* if sentenced to life imprisonment. The *Simmons* plurality stated the rule as follows: "Because truthful information *of parole ineligibility* allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." 512 U.S. at 169 (emphasis added). Likewise, the concurring opinion of Justice O'Connor specified that "in such a case the defendant should be allowed to bring *his parole ineligibility* to the jury's attention – by way of argument by defense counsel or an instruction from the court – as a means of responding to the State's showing of future dangerousness." *Id.* at 177 (emphasis added). In this case, however, the jury never heard *anyone* say that petitioner would be ineligible for parole. The reason is that when defense counsel asked permission to read to the jury the no-

parole provisions of S.C. Code Ann. § 16-3-20(A) (1999 Cum. Supp.), the state vigorously opposed the request and persuaded the trial judge to deny it. JA 165. In compliance with the judge's ruling, defense counsel thereafter made no reference to petitioner's parole ineligibility. Despite counsel's seemingly hyperbolic claims that his client would go to prison "for the rest of his life," we know that the jury noticed his (and the court's) failure to say anything about *parole*, because the jury inquired about it during the course of deliberations. This sequence of events disproves the state's claim (made for the first time in its merits brief in this Court) that defense counsel's jury argument was an adequate substitute for the parole ineligibility instruction to which *Simmons* entitled him.

For the same reasons, the record fails to support the state's assertion that the trial judge's instructions actually amounted to a *Simmons* charge. Apparently recognizing that the initial instruction that "life imprisonment means incarceration until the death of the offender" did not exclude the possibility of intervening parole release, the jury asked two questions about parole. In response, the judge gave a slightly weaker version of the same ambiguous instruction that had prompted the jury's parole questions in the first place,[1] and added a potentially misleading admonition not to consider "parole eligibility or ineligibility." JA 240. At the time, the prosecution

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[1] The court's initial instruction stated that "life imprisonment means incarceration until the death of the offender." JA 209. The supplemental instruction omitted the word "incarceration," and informed the jury only that "life imprisonment means until the death of the offender." JA 229.

understood full well that none of these instructions conveyed petitioner's statutory parole ineligibility to the jury. Indeed, that was the very reason why the state so energetically opposed petitioner's request to have the no-parole statute read to the jury. Although *Simmons* does not dictate *who* must inform the jury that the defendant can never be paroled, it clearly requires that *someone* must. In this case, as in *Simmons* itself, no one did.

2. Next, the state renews the only argument on which it relied in the trial court: that *Simmons* does not apply because the prosecution did not "argue" to the jury that petitioner's future dangerousness was a reason to sentence him to death. Brief for Respondent at 42-49. Having already discussed this contention in his opening brief, Brief for Petitioner at 25-34, petitioner has only a few observations to add here.

The state correctly notes that its formal pretrial notice regarding petitioner's alleged future dangerousness (a notice the state now deprecates as "boilerplate") was not given to the jury. Brief for Respondent at 46. However, the pretrial notice is significant because it shows that the state itself recognized that its penalty phase evidence included the nonstatutory factor of future dangerousness. This pretrial candor gave way to the present semantic hairsplitting only after the state had turned its attention to evading the due process rule of *Simmons*.

The state suggests that both the *Simmons* plurality opinion and Justice O'Connor's concurrence require some sort of explicit prosecution argument regarding future dangerousness. While *Simmons* itself did involve prosecution argument, the Court made clear that the *Simmons* right of rebuttal is also triggered by a "showing" of

future dangerousness. 512 U.S. at 169 ("truthful information of parole ineligibility allows the defendant to 'deny or explain' the *showing* of future dangerousness" (emphasis added)). Justice O'Connor's concurring opinion likewise recognized that "[w]hen the State seeks to *show* the defendant's future dangerousness . . . the defendant should be allowed to bring his parole ineligibility to the jury's attention – by way of argument by defense counsel or an instruction from the court – as a means of responding *to the State's showing* of future dangerousness." *Id.* at 177 (emphasis added). Thus *Simmons* does not support the state's implicit claim that the state can show by evidence that the defendant will be dangerous unless executed, and yet eliminate the defendant's right to a no-parole instruction merely by refraining from hammering home its future dangerousness case in summation.

The state also misreads *Simmons* as holding that the state may withhold truthful information concerning a defendant's parole ineligibility while seeking to prove that he will remain dangerous *in prison*. Brief for Respondent at 43-44. The actual discussion of this point in the *Simmons* plurality opinion is as follows:

> Of course, the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff. But the State may not mislead the jury by concealing accurate information about the defendant's parole ineligibility.

512 U.S. at 165 n.5. Likewise, Justice O'Connor noted that whenever due process entitles a capital defendant to inform the jury of his parole ineligibility, "the prosecution is free to argue that the defendant would be dangerous in prison." *Id.* at 177. These passages make clear that proof of a defendant's likely misconduct in prison is a permissible prosecution *response* to the fact that he will be ineligible for parole, not a basis for withholding accurate parole information in the first instance.

CONCLUSION

For the foregoing reasons and those set forth in his opening brief, petitioner requests that the Court reverse the judgment of the South Carolina Supreme Court inso-far as it leaves undisturbed his sentence of death.

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In The

Supreme Court of the United States

WESLEY A. SHAFER,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

On Writ Of *Certiorari* To The Supreme Court Of South Carolina

BRIEF *AMICUS CURIAE* OF THE CORNELL DEATH PENALTY PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The Cornell Death Penalty Project (the Project) is an undertaking of the Cornell Law School. Part of the Project's mission is to conduct empirical analyses of juror decision making in capital cases as a participant in the multi-state Capital Jury Project (the CJP).[2] The Project is responsible for the CJP's efforts in South Carolina and has so far conducted interviews with 187 jurors who served on 53 South Carolina capital cases tried between 1988 and 1997. Empirical analyses based on those interviews have been published in a number of articles.[3] Twenty-one additional interviews conducted in the summer of 2000 are in the process of being added to the existing database. The Project seeks to intervene as *amicus curiae* in cases presenting questions on which the Project's

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

[2] For a description of the CJP and its methodology, see *infra* note 4.

[3] *See* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, __ S. CAL. L. REV. (forthcoming Jan. 2001); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).

empirical findings could prove helpful to the tribunal's decision making.

ARGUMENT

I.

IN EVERY CAPITAL CASE IN WHICH LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IS A SENTENCING OPTION, THE JURY SHOULD BE INFORMED OF THE DEFENDANT'S INELIGIBILITY FOR PAROLE.

"The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994) (plurality opinion). According to *Simmons*, two conditions must concur to create this "false dilemma." First, future dangerousness must be "at issue," thereby creating the dilemma. Second, the defendant must be parole ineligible, a fact which makes the dilemma between imposing a life sentence and preventing danger to society in the future a *false* one. *See id.*; *see also Ramdass v. Angelone*, 120 S. Ct. 2113, 2119 (2000) (Due process requires that where future dangerousness is "at issue" the defendant is entitled "to inform the jury of parole ineligibility, either by a jury instruction or in arguments by counsel.").

The *Simmons* rule is a rule of disclosure. It is based on the broader due process principle prohibiting the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Here we briefly review the empirical findings that provide compelling support for the general rule announced in *Simmons*. We then turn to the open question of when future dangerousness should be deemed "at issue." On this question the available data reveals that jurors are very likely to discuss future dangerousness and to rely upon it when deciding what sentence to impose *regardless of whether the prosecutor presents evidence relating to future dangerousness or argues future dangerousness in summation*. The published CJP research, as well as our own analysis of interviews with South Carolina jurors, shows that future dangerousness is "at issue" in every capital case. Thus in all capital cases in which life imprisonment without parole is an alternative sentence to the death penalty, the jury should be fully informed about the defendant's parole ineligibility.

A. Jurors Substantially Underestimate the Minimum Period of Incarceration for Capital Defendants Who Are Not Sentenced to Death.

This Court first confronted the question of whether due process requires a sentencing jury to be informed of a capital defendant's parole ineligibility in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The plurality and concurring opinions in *Simmons* both noted that life-term defendants had historically been eligible for parole. Only recently had parole been placed off-limits to such defendants – a development of which many jurors would be unaware. *See id.* at 170 (plurality opinion); *id.* at 177-78 (O'Connor, J., concurring in the judgement). The concern at the core

of *Simmons* was that without full and complete information regarding a defendant's ineligibility for parole, jurors would be confronted with what was in reality a false choice: Because jurors substantially underestimate the time a capital defendant will spend in prison if not sentenced to death, they mistakenly fear that declining to impose a death sentence will expose the public to future danger. *See id.* at 163-64 (plurality opinion) ("Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.").

The empirical evidence accumulated since *Simmons* serves only to reinforce the wisdom of the rule it announced. The CJP data is unequivocal.[4] Researchers

[4] The CJP is a National Science Foundation-funded, multi-state research effort designed to better understand the dynamics of juror decision making in capital cases. In 1990 the CJP began interviewing jurors who had served on capital cases. CJP researchers have to date conducted interviews with 916 jurors who sat on 257 capital trials in 11 different states (Alabama, California, Florida, Georgia, Kentucky, Missouri, North Carolina, Pennsylvania, South Carolina, Texas, and Virginia). *See* William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 608 n.6 (1999). The CJP's aim was to conduct interviews with at least four jurors from a sample of cases in which half of the cases resulted in a final verdict of death and half in a final verdict of life imprisonment. The total number of interviews to date in each state ranges from 45 jurors in Virginia to 187 in South Carolina.

Each juror responded to a set of questions contained in a 51-page survey. Interviewers were trained to administer the survey. Each interview generally lasted between three and four hours. The survey asked questions about the guilt phase of the trial as well as the penalty phase; about the evidence presented; about the demeanor of the defendant, the actions of the victim's family, and the performance of the lawyers and the judge; about the legal instructions given; about the process of the jury's deliberations; and about the verdict reached. Demographic information – e.g., race, sex, age, religion – was also collected, as was information about each juror's attitudes toward the death penalty and the criminal justice system more generally. All told each interview yielded data on over 750 variables. *See generally* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

have consistently found that "jurors grossly underestimate how long capital murderers not sentenced to death usually stay in prison." William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 648 (1999) (analyzing multi-state data). In South Carolina, where Petitioner was tried, the median juror estimate of years usually served by capital murderers not sentenced to death is only seventeen years. *See id.* at 647 tbl.1. Thus the typical South Carolina juror, told only that the alternative to a death sentence was a sentence of "life imprisonment," would have thought that nineteen-year-old Wesley Shafer would be released at the still-threatening age of thirty-six. Less than one percent of South Carolina jurors would have (correctly) believed that he would never be released. *See id.* at 649 tbl.2.

These misconceptions about parole eligibility have predictable and deadly consequences. The shorter the period of time that a juror thinks the defendant will be imprisoned, the more likely he or she is to vote for death on the final ballot. *See id.* at 655 (analyzing multi-state

data);[5] Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 5-6 (1993) (analyzing South Carolina data).[6] Indeed, issues related to the defendant's dangerousness should he ever return to society (including the possibility and timing of such a return) are second only to the crime itself in the attention they receive during the jury's penalty-phase deliberations. *See id.* at 6. Future dangerousness to society overshadows evidence presented in mitigation (such as the defendant's intelligence, remorse, alcoholism, mental illness), and even any concern about the defendant's dangerousness in prison. *See id.*

B. For Capital Jurors, Future Dangerousness Is Always "At Issue."

When future dangerousness is "at issue" the defendant is entitled "to inform the jury of parole ineligibility, either by a jury instruction or in arguments by counsel."

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[5] About two-thirds of the jurors who believed the defendant would be released in less than 20 years cast their final vote for death, whereas less than half of the jurors (43 percent) who believed the defendant would serve at least 20 years cast their final vote for death. *See* Bowers & Steiner, *supra*, at 655 tbl. 3. Moreover, misconceptions regarding parole eligibility and release exercise the greatest influence on jurors who have not made up their minds at the beginning of the jury's deliberations. *See id.* at 660.

[6] The odds that this correlation – i.e., the correlation between a juror's estimate of the defendant's length of imprisonment and the juror's vote – is the product of chance are only one in a thousand. *See* Eisenberg & Wells, *supra*, at 7.

Ramdass, 120 S. Ct. at 2119. But when should future dangerousness be deemed "at issue?"

Simmons itself presented a case in which the "State raised the specter of . . . future dangerousness generally." *Simmons*, 512 U.S. at 165 (plurality opinion). Petitioner here argued in the court below that, taken together, the state's evidence and arguments likewise raised the specter of future dangerousness. Petitioner therefore reads *Simmons* to require a particularized showing on the part of the defendant that the state put the defendant's future dangerousness "at issue." Our analysis of the available data lead us to urge a simpler rule: Future dangerousness is on the minds of jurors and therefore "at issue" in virtually all capital cases; consequently, the defendant should be required to make no particularized showing of that fact.

CJP interviews conducted among jurors in several states provide strong evidence that, no matter what the prosecution says or does, future dangerousness is always on the minds of capital jurors. The CJP asked jurors two questions that can be used to assess the extent to which the prosecution focused on the defendant's future dangerousness: (1) "How much did the prosecutor's evidence and arguments at the punishment stage of the trial emphasize . . . that the death penalty will keep [the defendant] from killing again?" and (2) "How much did the prosecutor's evidence and argument at the punishment stage of the trial emphasize . . . danger to the public if [the defendant] ever escaped or was released from prison?" The responses reveal that even in cases in which the prosecution's evidence and argument at the penalty phase did "not at all" emphasize the defendant's future

dangerousness, jurors who believed the defendant would be released in under 20 years if not sentenced to death were much more likely to cast their final vote for a death sentence than were jurors who thought the alternative to a death sentence was 20 years or more.[7] *See* Bowers & Steiner, *supra*, at 665 tbl.6.

In an effort to further explore the role future dangerousness plays in capital jury decision making – even when the prosecution's evidence and argument at the penalty phase do not focus on the defendant's future dangerousness – we conducted for purposes of this submission two additional and relatively simple analyses based exclusively on our interviews with South Carolina jurors.

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[7] Among jurors who believed the prosecutor did not emphasize at all that the death penalty would prevent the defendant from killing again and who estimated that the alternative to a death sentence was zero to nine years in prison, 73.1 percent cast their final vote for death; similarly, among those who estimated the alternative was ten to nineteen years, 69.4 percent cast their final vote for death. In contrast, among those who estimated the alternative was twenty years or more, only 43.8 percent cast their final vote for death. *See* Bowers & Steiner, *supra*, at 665 tbl.6.

Among jurors who believed the prosecutor did not emphasize at all the danger of escape or release and who estimated that the alternative to a death sentence was zero to nine years in prison, 58.1 percent cast their final vote for death; similarly, among those who estimated the alternative was ten to nineteen years, 63.3 percent cast their final vote for death. In contrast, among those who estimated the alternative was twenty years or more, only 39.0 percent cast their final vote for death. *See id.*

We first explored the extent to which jurors – without any prompting from the prosecution – discussed future dangerousness during their deliberations. We isolated the responses of those jurors who said that the prosecutor's evidence and argument at the punishment phase of the trial emphasized "not at all" the danger to the public if the defendant ever escaped or was ever released. Despite the *prosecutor*'s total silence on the subject of future dangerousness, 23 percent of the jurors nonetheless said that the *jury*'s discussions focused "a great deal" on the defendant's dangerousness if he ever got back into society, and an additional 30 percent said the jury focused on that issue "a fair amount." *See* App. A tbl.1.[8] Likewise, 21 percent said that the jury's discussion focused on how likely the defendant would be to get a parole or pardon "a great deal," and another 40 percent said the jury discussed it "a fair amount." *See id.* Thus even in cases where prosecutors have not affirmatively "raised the specter of future dangerousness," that specter is present all the same, with over *half* of the jurors reporting (based on these measures) that the jury's discussions focused either a great deal or a fair amount on future dangerousness.[9]

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[8] The information described in the above paragraph and reproduced in Appendix A was previously collected under the auspices of the CJP and the Cornell Death Penalty Project. The reported percentages are based on a simple operation known as "cross-tabulation." The underlying data needed to replicate the results are available to anyone (including of course the members of this Court) upon request.

[9] The other measures reported in Table 1 tell a similar story. Twenty-two percent of the jurors said the jury discussed a "great deal" *how long* it would be before the defendant was

Second, the extent to which the jury focuses on and discusses future dangerousness is not *just* talk. Even among those jurors who reported that the prosecutor's evidence and argument emphasized "not at all" the danger to the public if the defendant ever escaped or was released, most said the defendant's future dangerousness was important to his or her own sentencing decision. "When considering punishment," 31 percent of the jurors were "greatly concerned" "that the defendant might get back into society someday, if not given the death penalty," and another 21 percent were "somewhat concerned."[10] *See* App. A tbl.2. Thus on an *average* jury in a case in which the prosecutor made *no* reference to the defendant's future dangerousness, *eight or nine* jurors would be either greatly concerned or somewhat concerned that the defendant might return to society if not given the death penalty.

In short, future dangerousness is "at issue" in the minds of a substantial number of jurors *regardless of the nature of the prosecutor's evidence and argument*. *Cf. Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000) (granting relief where petitioner argued that a reasonable probability

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released, and an additional 35 percent said the jury discussed it "a fair amount." Likewise, 32 percent said the jury discussed "a great deal" the need to prevent the defendant from killing again, and an additional 34 percent said the jury discussed it "a fair amount." *See* App.A tbl.1.

[10] Similarly, when asked "How important was 'keeping the defendant from ever killing again' for you in deciding what the defendant's punishment should be?" 43 percent of these unprompted jurors said it was "very important," and another 26 percent said it was "fairly important." *See* App. A tbl.2.

existed that evidence not presented at trial would have influenced the vote of "at least one juror"). Whether or not the prosecution talks about future dangerousness, the jurors surely will. Indeed, the omnipresent specter of future dangerousness explains why jurors – including the jurors in Petitioner's case – commonly ask questions about a defendant's parole eligibility. *See, e.g.*, J. Mark Lane, *"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 Loy. L.A. L. Rev. 327, 335-36 (1993) (reporting that sentencing juries asked questions about parole eligibility in one quarter of the cases in which a death sentence was returned). Jurors are desperate to know the truth.

The best rule here is honesty. If a capital defendant not sentenced to death will never see the light of day, the jury should be told that simple truth. Such a rule not only has honesty on its side; it would also better advance the goals *Simmons* itself was originally intended to serve. It would ensure that the false dilemma never arises. It would also have the advantage of being clear and "workable." *Cf. Ramdass*, 120 S. Ct. at 2120 (emphasizing that application of *Simmons* only to cases where the defendant is ineligible for parole under state law is a "workable rule"). Prosecutors would have no incentive under such a rule to see how far they could hint at future dangerousness without actually crossing some invisible line. Nor would trial judges or reviewing courts have to deal one case at a time with the often elusive question of whether the state, either through evidence or the argument, affirmatively "raised the specter of . . . future dangerousness generally." *Simmons*, 512 U.S. at 165 (plurality opinion).

Most importantly juries would no longer sentence defendants to death "on the basis of information which [the defendant] had no opportunity to deny or explain." *Gardner*, 430 U.S. at 362.

CONCLUSION

Like the jury in *Simmons*, the jury in Petitioner's case "was left to speculate about [his] parole eligibility when evaluating his future dangerousness and was denied a straight answer even about petitioner's parole eligibility even when it was requested." *Simmons*, 512 U.S. at 165-66 (plurality opinion). Like the defendant in *Simmons*, and like all capital defendants in states where an alternative to the death penalty is life imprisonment without the possibility of parole, Petitioner "was prevented from rebutting information which the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death." *Id.* at 165 (plurality opinion). This barrier created "an unacceptable risk that the death penalty [may have been] imposed . . . through whim *or mistake*." *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring in part and concurring in the judgement) (emphasis added) (citation omitted).

The reality of capital jury decision making is this: Questions about the defendant's future dangerousness – questions to which clear information about the defendant's ineligibility for parole can mean the difference between life and death – will always be "at issue" in the minds of the jurors in whose hands the defendant's fate finally rests. Consequently, whenever the alternatives to

the death penalty include a sentence of life imprisonment without the possibility of parole, the trial court should provide the jury with the information necessary to dispel the jury's inevitable but erroneous concerns about future dangerousness.

Respectfully submitted,

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APPENDIX A

Table 1

Responses of Jurors Who Said the Prosecutor's Evidence and Argument at the Punishment Stage of the Trial Emphasized "Not at All" the Danger to the Public if the Defendant Ever Escaped or Was Released From Prison (% Responding)

How much did the discussion among the jurors focus on the following topics?

	A Great Deal	Fair Amount	Not Much	Not At All	*n*
Defendant's dangerousness if ever back in society	23	30	21	26	53
How likely he would be to get a parole or pardon	21	40	19	21	53
How long before he got a parole or pardon	22	35	20	24	51
Need to prevent him from killing again	32	34	15	19	53

Table 2

Responses of Jurors Who Said the Prosecutor's Evidence and Argument at the Punishment Stage of the Trial Emphasized "Not at All" the Danger to the Public if the Defendant Ever Escaped or Was Released From Prison (% Responding)

How important was the following consideration for you in deciding what the defendant's punishment should be?

	Very	Fairly	Not Much	Not at All	*n*
Keeping the defendant from ever killing again	43	26	11	19	53

When you were considering the punishment, were you concerned that the defendant might get back into society someday, if not given the death penalty?

	Yes, Greatly Concerned	Yes, Somewhat Concerned	Yes, But Only Slightly Concerned	No, Not At All Concerned	*n*
	31	29	10	31	52